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Brief of Greer for U. S.

Filed Jan. 21, 1898.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 150.

LOWRY W. HUMES, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES, DEFENDANT IN ERROR.

On Writ of Error to the Circuit Court of United States for Western Division of Western District of Tennessee.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

J. M. GREER, SOLICITOR.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1896.

No. 480.

HUMES, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

BRIEF AND ARGUMENT FOR PLINTIFF IN ERROR.

STATEMENT OF CASE.

In the Circuit Court of the United States for the Western Division of the Western District of Tennessee, May term, 1895, the indictment herein was returned charging the defendant with wrongfully withholding specified sums of pension money from five persons therein named. The indictment was found on section [illegible], R. S. It contained nine counts. On the first trial defendant was found not guilty on six counts. He was not found guilty on any. On the second trial he was found not guilty on one count, and reported, as we respectfully submit, a forced conviction against the facts and the law on two counts, because of the erroneous charge of the court.

After an ineffectual effort for a new trial the defend-

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ant was fined $500 and ordered imprisoned, and the case appealed in error to this court. (R., p. 14).

The indictment was not placed, as it should have been, on the final paragraph of section 4786, as amended July 4, 1884, and as was done in the Ballew case. 160 U. S., 189. Congress had some purpose in re-enacting this provision. Doubtless 5485 was repealed by the re-enactment of 4786.

(Placing the words in italics in the brief is usually counsel's.)

The law construing these statutes is stated in almost the same words in two cases.

In Ballew case, this court, by Mr. Justice White, construing 4786, say: *There is a particular class of persons to whom the statute is applicable. It is any agent, attorney, or any other person instrumental in prosecuting any claim for pension.*

In Benecke case, 98 U. S. 447, this court, by Mr. Justice Miller, construing this very section 5485 here involved, say: *The persons described who may be guilty are those prosecuting claims for pension before the Pension Office.*

As further illustrating the view that the words of these statutes have a definite signification, this court in the last case cited also say:

"*And it is but a just limitation of the word claimant that he should be a claimant under that act, a claimant before the pension bureau.*"

The indictment here as before said contains nine counts. Two sets of counts, to-wit: Being then and there agent and attorney for and person instrumental in prosecuting claims (before the Pension Office); first, did *wrongfully withhold* pensions, to-wit: $486.40 from Anderson and $517.20 from Bloodson; or any part thereof. First and third counts, first set, those involved here. Second, did *unlawfully retain* (withhold) etc. for his services and instrumentality greater compensation, etc. R., p. 1, 2, second set of counts.

As it did in the Ballew case, the indictment charged the offense in the double aspect. These statutes are all much alike. The differences are those shown beyond.

When put upon trial the defendant moved to quash the indictment. This motion was overruled. R., p. 8, 9. And that action of the trial court is one of the assignments of error here. The defendant was then placed on trial on all nine counts. After several days' trial the district attorney declined to prosecute on counts five and six, and the defendant was discharged as to them. R., p. 11.

On this trial the jury found the defendant not guilty, specifying counts two, four, eight and nine.

That he was not agent or attorney for or any other person instrumental in prosecuting claims (before the Pension Office) and did not *unlawfully* demand, receive or retain (withhold) from Anderson $486.40, or $517.20 from Bloodson, or $116.00 from Haynes, or any part thereof, for his services and instrumentality—greater compensation, etc. R., p. 11, 12.

That he was not agent for or any other person instrumental in prosecuting the claim for Prior (before the Pension Office) and did not wrongfully withhold from him $15.80, or any part thereof.

On the second set of counts there was none as to Prior, who had been granted and was drawing his pension for years before he knew the defendant at all or he him. That the defendant should be charged with wrongfully withholding from Prior was as far as the pleader seemed to think an obsolete statute could be made to stretch in an indictment, even with the charge to the jury by the trial court that the defendant, as a fact, was instrumental in the prosecution of these claims for pension in such sense that he was within the statute and guilty if he wrongfully withheld pensions *allowed*, not *due*, as this court held on a like statute in the Ballew case.

The jury reported they could not agree on counts one, three and seven, and a mistrial was entered as to them.

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And the defendant at once, for the second time, put on trial on said last named three counts.

On this trial the jury found the defendant not guilty on count seven. R., p. 14. That he was not agent for or any other person instrumental in prosecuting the claim for pension of Haynes (before the Pension Office), and did not wrongfully withhold from him $116.00 or any part thereof. There were three questions on this indictment for the jury to find as facts. First. Did the defendant belong to the class so as to be within the statute? Second. If he did belong to the class, did he keep back money as a fact? Third. If he belonged to the class as a fact, and as a fact kept back money, then the question of fact for the jury to find was, under which clause of the statute? Under the first or second? Greater compensation, etc., first, or simply kept back, second?

The jury had the same first and second questions of fact to find as to the first and second clauses of the statute.

First. Question as to both clauses of the statute, did he belong to the class?

The jury found the defendant not guilty on the first trial. That he was not the agent, or attorney or any other person instrumental in prosecuting these very claims for pension (before the Pension Office) for these very same parties.

Then if he didn't belong to the class as a fact, he would not be guilty in fact or law, even if he admitted he kept back the money. And therefore he is not guilty under both clauses of the statute, for the very plain reason that he does not belong to the class of persons denominated by the statute, and he is therefore not within the meaning or terms of the statute, as this court have twice held in the cases first cited.

Second. Question of fact for the jury to find under both clauses of the statute, did he keep back the money, or any of it?

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The jury found the defendant not guilty on the first trial—that he didn't keep back any money.

If, in fact, he didn't belong to the class, and, in fact, didn't keep back the money, that ended the case, because then it is immaterial for the jury or the court whether it was in regard to first clause—greater compensation, or second—simply keeping back the money.

If he belonged to the class as a fact, and in fact kept back money, as found by the jury, then this court held in Ballew's case the law is he can't be guilty, and within the second clause, unless he kept back the money that was due before it was paid over to the pensioner and passed into her possession and control, and was by her deposited in bank, where the simple relation of debtor and creditor existed.

That he couldn't be guilty under the second clause because the pension money was not due, but had been paid over to the pensioner, although the jury found that Ballew belonged to the class as a fact, and, in fact, kept back the money—over $1,800.00.

But if he belonged to the class as a fact, and, in fact, kept back the money, as found as facts by the jury, then this court state the law to be under first clause—greater compensation—taken at any other time or manner, as that act provides, and taken out of the pension money, then he would be guilty. Or Frisbie's case, supra (Mr. Justice Brewer), first clause, act June 27, 1890, although he should take it out of any other money, whether the pension was granted or not.

The questions of fact for the jury to find on the first and third counts of the indictment were: Was defendant agent or attorney or any other person instrumental in prosecuting the claims of Anderson and Bloodson (before the Pension Office), and did he wrongfully withhold $486.40 from Anderson or $517.20 from Bloodson, or any part thereof.

The trial court said the defendant was not agent

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or attorney instrumental in prosecuting the claims for pensions of Anderson and Bloodson (before the Pension Office) (R., p. 15.)

If not, surely it was the duty of the court to have so charged the jury, and it was manifest error not to have so charged them.

Thus, with the trial court there was but one of these three questions of fact to determine : Was the defendant any other person instrumental in prosecuting the claims for pension of Anderson and Bloodson (before the Pension Office)?

And this question, it seems, was of easy solution to the trial court, for he found that fact for the jury, and so charged them. He usurped the province of the jury.

As fully set out in the assignments and brief beyond, and it is not re-stated to avoid repetition.

The trial court said (R., p. 15) *it was not so much as contended even in argument by the Government that the defendant was either the agent or the attorney of Anderson and Bloodson, or any of the parties* in prosecuting their claims for pension before the Pension Office. For all—most of it the Government's record—proof showed he was not, but that Powers and Chiles were.

If he was not the agent or the attorney, then the question of fact for the jury, and not for the trial court, was : Was he or any other person instrumental in the sense an agent or attorney is instrumental in prosecuting these claims for pension before the Pension Office?

If he only acted in connection with them as a United States Commissioner simply, in his purely official capacity in administering their oaths to the vouchers, and so certifying under his seal of office, how could this be said to be being any other person instrumental in prosecuting claims for pension before the Pension Office and within the statute?

It was as clearly as acts and words could make it not instrumental in the sense of prosecuting claims for pen-

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sion as an agent and attorney is instrumental in prosecuting them before the Pension Office.

It might be said to be an instrumentality in any other sense of the word, but how could it be said to be instrumental in the sense an agent and attorney is instrumental in prosecuting claims for pension before the Pension Office? How can you be instrumental in the sense an agent and attorney is instrumental in prosecuting claims for pension before the Pension Office that had been granted years before by the Pension Office, on the efforts of Chiles and Powers, agents, attorneys and other persons instrumental in prosecuting these very claims for pensions before the Pension office, issued by the Pension Bureau with Powers and Chiles, marked, enrolled, recognized and paid the $10 fees allowed by the act June 27, 1890, on the Pension Commissioner's orders, by the United States agent making payment of the pensions allowed and due, as the agents, attorneys and other persons instrumental in prosecuting these very claims for pension of Anderson and Bloodson before the Pension Office, and who, in fact, procured the granting of those very pensions by the Pension Bureau.

But whatever the fact was, whose province alone was it? It was that of the jury alone, and the trial court usurped and invaded that province of the jury. And, as noted before in the Benecke case, this court say they must be prosecuting claims before the Pension Office. Was the defendant prosecuting claims before the Pension Office? He never was. No one ever claimed he was.

So he was not within the statute and not guilty in law as well as fact. The trial court never even in its most extreme view ever claimed defendant was prosecuting claims for pension before the Pension Office. But only that he was instrumental, the trial court said.

That idea of instrumental was the extremity of comprehension, and without any limitation or qualification whatever. It was that it embraced all classes. That whatever was done, every act was a violation of law.

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The man who sets the type to print the opinions of this court you would properly class as the Chief Justice or Associate, was the view the trial court took of the meaning of the words.

On the first trial the jury found on counts two and four, on the charge by the then trial court, the defendant not guilty—that he was not agent, attorney or any other person instrumental in prosecuting the claims for pensions of Anderson and Bloodson before the Pension Office, and was not instrumental as such, and did not demand, receive or retain (withhold) from them for his services and instrumentality in prosecuting their claims for pension before the Pension Office anything, greater compensation, etc., to wit: not $486.40 of Anderson, or $517.20 from Bloodson; or any part thereof.

Bloodson's pension had been granted December 11, 1891—years before he knew the defendant, or he him, or had seen or heard of him.

So that defendant could hardly be said to have been instrumental in prosecuting and procuring a pension before the Pension Office—granted three years before Bloodson knew him at all. Anderson's was much the same. The record shows that Anderson and Bloodson and all these witnesses were pensioned by the invalid pension act June 27, 1890.

The indictment here charged that the defendant had violated 5,485, an amendment March 3, 1873, of the penal section of the general pension law, originally passed July 14, 1862 (4,692 and seq.).

And the defendant has suffered a conviction on proof showing, if any act was violated, which is denied, it was the penal statute, section 4, of the invalid pension act, June 27, 1890.

In Ballew's case he was found guilty by the jury on both counts; first, wrongful withholding, and second, retaining (withholding) greater compensation, etc., at any other time or in any other manner, as provided by that

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act—final paragraph of section 4,786, as amended July 4, 1884.

This court reversed Ballew's case on the first count and affirmed it on the second. There the illegal fee was a check on a bank to H. Ballew's order, one other than that defendant; and the check was endorsed and collected of the bank by H. Ballew. There was no question in that case but that that defendant was the sworn and duly and regularly enrolled attorney and agent of that pensioner in the pension bureau, and was so recognized by the department and had been on the Pension Commissioner's order paid by the United States agent, making the payment of the pension allowed, and due the legal fee, $25, under that act. He was a pension agent, attorney and other person prosecuting that claim for pension before the pension office. This was his sole business in the place of his residence. As the attorney, agent, etc., he was the person instrumental in prosecuting that claim for pension before the Pension Office and who obtained that pension—had it granted through his services and instrumentality to that party.

In the case at bar the defendant was found not guilty on the first trial by the jury on all the counts charging retaining (withholding) greater compensation, etc. The count on which this court affirmed the conviction in Ballew's case. The jury found in the case at bar that the defendant was not the agent or attorney or any other person instrumental in prosecuting the claims for pension before the Pension Office of any of the parties named in the indictment. But the defendant under the peculiar charge of the trial court in which it invaded the province of the jury and found for them the primary fact —condition precedent—that the defendant was instrumental in prosecuting these claims for pension before the Pension Office for said parties, and so was within the statute, and so charged the jury, and in effect charged them that the defendant was guilty, and the jury on such

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a charge could but report the defendant guilty on the first and third counts, on which this court held Ballew could not be found guilty.

In many respects Ballew's is like the case at bar.

Here the trial court erred in not explaining to the jury that the presumption of innocence was the witness of the law—that stood for the accused until overturned by proof to the contrary carrying home a degree of conviction short only of absolute certainty, and beyond a reasonable doubt.

The trial court usurped and invaded the province of the jury. Gave and refused to give about the charge given and refused in Ballew's case.

Gave undue prominence to the Government's proof.

Made no comment on the record evidence of the defendant that the bank books showed these two pension checks were paid to Anderson and Bloodson and the dates they were paid, as did the vouchers and checks.

The bank teller swore he knew Anderson and Bloodson both and knew he paid them their money on those two checks. Sanderlin swore the same, another witness. This Anderson and Bloodson denied alone and unsupported.

Anderson got his check, and on it his money from bank October 8, 1894, Monday.

The bank books showed this check was paid Anderson that day. The bank teller swore he paid Anderson the money on that check that day. That he knew Anderson, and knew this and remembered it.

Franklin swore he saw Anderson that day leave defendant's office with his check in his hand for the bank with Sanderlin to get his money. Sanderlin swore he showed Anderson the Mechanics' Savings Bank and saw him paid the money on his check that day by the teller.

Defendant swore that Anderson got his pension check that day and left the office for the bank with Sanderlin

to get the money and he never saw Anderson again that day, nor any more until November following.

Anderson denied all this.

Finley swore he came to Memphis with Anderson October 29, 1894, Tuesday. That Anderson left him at the wagon yard a mile and a half across the city. Said he was going to the defendant's office. That at 2 or 3 o'clock he met Anderson again at the wagon yard. That where Anderson had been during the time he did not know, or what he had been doing. That Anderson gave him a roll of money. That he counted it. That it was $50. That he went to see Laughlin, attorney. That they went to defendant's office. That they found defendant pressed with much business with many other persons. That they called him from the front room to the back. That there, while standing, they had a moment or so of hurried talk with defendant. That he told them Anderson had gotten his pension. That he said it was $60. That his money came in the morning's mail. That he kept $10, his attorney's fee. That Laughlin began the conversation and did most of the talking.

Laughlin did not corroborate Finley. Laughlin swore he did not know what day, week or month it was. That defendant said there was a $10 attorney's fee, but he did not say it was his or that he took it.

Bloodson swore about the same on his claim. As the record shows, he said he got $5 in two places and $50 in another in money from defendant December 27, 1894.

A. Snyder swore Bloodson worked all Christmas eve at her house plowing a lot 55x103 feet and planting out a few little trees. F. Snyder swore she was not at home that day and did not know.

Copeley (c.), who Bloodson swore was named Copeland, swore Bloodson knew, for he had told him he would get $500 or $600 when he first drew his pension.

Bloodson swore, as did Anderson, that while they both knew they should get $500 or $600 each when they

first drew, yet they took from defendant $5 and $50 and made not a word of complaint to him about it. And Anderson continued to have defendant make out his voucher each draw day afterwards until after this trial in November, 1895. Defendant swore Bloodson got his check for $567.20 December 24, 1894, and left the office with the check in his hand, with Sanderlin, for the bank and defendant did not see him again that day or for days. The bank books showed this. The teller swore it, Franklin, L. C. Humes and Sanderlin also.

The trial court erred in refusing to grant defendant a new trial on the newly discovered evidence.

The trial court said much in the ten page printed charge on Anderson's claim and its view of it. And much the same in Bloodson's; thus forcing conviction on these two.

In Haynes' claim the proof was about the same, but the trial court in the charge said only a few words, laid no particular stress on its view, so the jury construed it on that charge; the trial court did not insist on a conviction, and so they found not guilty.

We ask to make this further additional statement. The record was filed here March 30, 1896. The clerk of the court below had to get an extension of time for him to copy it in, and thus in its being hurried away so as to be within even the extended time given the clerk, counsel did not get an opportunity to examine it before it was filed here. In April, 1896, the case was advanced on motion of the Attorney General and set for trial October 19, 1896. Owing to circumstances which counsel and client could not avert, the case was called October 22, 1896, and dismissed because the record was not printed. This dismissal was afterwards set aside and the case reinstated on the docket, and on another motion to advance it was reset for trial October 18, 1897, and the record printed. On receipt of a copy of the printed record the senior counsel in the case was dangerously ill, and was so for about a

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year, when it resulted in his lamented death. We have stated these facts, as we believe they show there has been no fault on our part in this case. The mishaps that have resulted have been our misfortune, as it seems to us.

On examination we note the record shows a failure to copy into it eight matters of evidence that the record itself calls for but were not copied by the clerk or court stenographer who took down the proceedings of the trial.

First. The testimony of L. C. Humes, son of defendant (R., p. 180), is not copied in the record at all. And but for the trial court's charge it would not show that any such witness had testified in the case at all. Fortunately the charge shows what this witness' evidence was.

Second. (R., p. 172) the calendar of 1894 to give the dates.

Third. (R., p. 22) the pension certificate.

Fourth. (R., p. 55) the voucher, and

Fifth. The check of Anderson.

Sixth. (R., p. 56) the certificate,

Seventh. The voucher, and

Eighth. The check of Bloodson.

These pages of the record all show that the District Attorney offered these seven matters in evidence and read them to the jury, but they are nowhere copied in the record. The record shows they are called for by the bill of exceptions on its very face, and their omission surely is not our fault. It is these omissions, we take it, that called forth from the then Solicitor General, in his letter of October 19, 1896, the expression, "the record is in grossly improper form." And we are inclined to agree with this view; while at the same time we respectfully submit it is no part of our fault.

One other matter is not shown by the record which we submit it is not improper to mention, while it may be true the record is not in proper shape to give the defendant the full benefit of it.

First. Defendant peremptorily challenged Juror

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Shepherd because he had formed and expressed an opinion touching the guilt or innocence of the defendant from having talked to one of the jurors of the former trial, who purported to state to him the facts of the case. This challenge upon this ground the trial court refused to allow, and the defendant then and there reserved an exception to that ruling and refusal.

Second. Defendant peremptorily challenged Juror Shepherd because the statute allows a party three peremptory challenges as to each offense. And defendant was on trial, using the words of this court in its opinion in McElroy v. United States, 164 United States 76, speaking by Mr. Chief Justice Fuller, *"for three separate and distinct offenses, complete in themselves, independent of each other, and not provable by the same evidence, and whose consolidation was not authorized by 1024 R. S. The offenses are in no wise parts of the same transaction, and dependent upon evidence of a different state of facts as to each of them. They were not for the same act or transgression, nor for two or more acts or transactions connected together, which might be properly joined, because they were substantive offenses, separate and distinct, complete in themselves and independent of each other, committed at different times and not provable by the same evidence. In cases of felony the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defense, or to prejudice him as to challenges, in the matter of being held out to be habitually criminal in the distraction of the attention of the jury, or otherwise, that it is the settled rule in England and in many of our states to confine the indictment to one distinct offense or restrict the evidence to one transaction.*

Necessarily where the accused is deprived of a substantial right (in our case proper number of challenges at least) by the action of the trial court, such action having been properly objected to, is reversible error.

And even if the defendants are the same in all the indictments consolidated, we do not think the statute authorizes

joinder of distinct felonies, not provable by the same evidence and in no sense resulting from the same series of acts.

It is only when they may be properly joined that a joinder is permitted. While the general rule is that counts for several felonies of the same nature, requiring the same mode of trial and punishment, may be joined in the same indictment, subject to the power of the court to quash the indictment or to compel an election, such joinder cannot be sustained where the offenses in no wise parts of the same transaction, and must rest upon evidence of a different state of facts as to each of them.

It cannot be said in such case that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions. The order of consolidation was not authorized by statute and did not rest in mere discretion. This is the opinion of this court in McElroy v. United States, 164 United States 76, *which was reversed and remanded for a new trial on that ground.*

Defendant's contention in the case at bar is that as the last time he was tried for three separate offenses he was therefore entitled to nine peremptory challenges. He had used three. Juror Shepherd was the fourth challenge and last man of the twelve chosen.

The trial court refused to grant defendant this challenge on this ground, and defendant then and there duly reserved an exception to the same.

It is too late for the trial of this case to suggest a diminution of the record, and indeed defendant does not want to delay the trial further, but states these omissions because he does not think them faults with which he is chargeable at all, in any way.

BRIEF AND ARGUMENT.

Counsel have grouped the assignments so that like questions may be presented together. 11 Assignment or Error. R., p. 175-6, 196-7.

The trial court erred in giving the following charge to the jury: "It appears from the statute, as you have observed, that it is necessary in order to make the case against the defendant:

"First. That he must have been the agent or attorney of the pensioner, or he must have been instrumental in the prosecution of the pension claim, before he fails within the category of the persons who are subject to the provisions of the statute; and

"Second. He must withhold from the pensioner all or a part of what was due the pensioner claimant."

So that two propositions are necessary to be established:

That defendant was an agent or instrumental in the prosecution of the claim, and secondly, that he withheld from the pensioner money that belonged to the pensioner, some part of the pension that was *allowed*. (*Not* due, as held in Ballew case).

"*Now, desiring to get the jury down to the real issue in this case as it comes to you*, leaving the jury free to find for itself, the court is of opinion that, considered in reference to either the Government's proof or the defendant's, and with reference to the written evidence or the oral,

"*That the defendant was instrumental in the prosecution of these claims in such sense as that if he withheld the money he would be within the provision of the statute and guilty.*

"*That brings you to the fact, then, of whether or not he did withhold these pension claims.*"

This was error, because it took from the jury all consideration of the evidence tending to show that the defendant was neither the attorney, agent, or person instrumental in procuring or prosecuting the pension claim of either Anderson or Bloodson. This being a question of fact, as to whether the defendant was or was not such agent, attorney, or person procuring said pension money, it was the province of the jury and their duty to deter-

mine such fact for themselves from the evidence, and the court could not instruct them upon this as matter of law.

Again the trial court says: "*That is the real issue,*"

"In respect to this Anderson transaction,"

"*Viz.: Who got the proceeds of that check?*"

"*If Mr. Humes got and retained the proceeds, or retained any part of it above the Notary's fee, then he is guilty; whereas if Anderson got it that is the end of the case so far as that count is concerned; or if, under the rule stated, you have a reasonable doubt about how that is, the defendant is entitled to an acquittal.*"—R., p. 176.

Again he says: "*So that did he withhold from Anderson all or any substantial part of that pension?*"—R., p. 178.

"*If so, he is guilty, and you should convict him; and if not, or if you have a reasonable doubt, acquit him.*"

Thus it is seen the trial court usurped and invaded the province of the jury in his charge in that nine separate times he withdrew from them the finding and consideration of what he himself first charged was the primary fact that they themselves must first find as a condition precedent before there could be any conviction: i. e., that the defendant "*must have been instrumental in the prosecution of the pension claim before he falls within the category of the persons who are subject to the provisions of the statute.*"

Twice the court stated to the jury fairly what they must find as a condition precedent before they could convict.

He says: "*It appears from the statute, as you have observed, that it is necessary in order to make the case against the defendant, first, that he must have been the agent or attorney of the pensioner, or he must have been instrumental in the prosecution, etc.; and second, if he was, he must withhold, etc.*"

And he reiterates it: "*So that two propositions are necessary so be established.*"

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And he repeats what they are again. He emphasizes it for the second time:

"That defendant was an agent or instrumental in the prosecution of the claim; and secondly, that if he was, he must withhold, etc."

Who found this primary fact that it was charged the jury must find as a condition precedent before there could be any conviction? The trial court; and so stated to the jury.

It may be suggested that in the first part of the charge the court used the words, *"leaving the jury free to find for itself, the court is of opinion that, etc."*

In the very next breath, where he repeats that charge, does he say again, *"leaving the jury free to find for itself, the court is of opinion, etc." No. There is no even apparent limit on his charge this time.* He says, *"That brings you to the fact, then, of whether or not he did withhold these pension claims."*

What has become of the primary fact that he told the jury they must first find as a condition precedent before there could be any conviction? What is it *"that brings you to the fact, then, of whether or not he did withhold these pension claims?"*

It was that the trial court had found the primary issue of fact—condition precedent for them which he at first had twice submitted to them, and he so charged them what it was, i. e., that defendant was instrumental in the prosecution of these claims in such sense as that if he withheld the money he would be within the provisions of the statute and guilty.

Next he says, *"and that is the real issue."*

There is no even apparent limit on these words. He does not tell them this time, "leaving the jury free to find for itself, the court is of opinion," etc.

He tells them, *"and that is the real issue."*

What has become of the primary other real issue—condition precedent, that he himself had twice charged

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them before, they themselves must first find before there could be any conviction?

He himself has found for them what that primary fact—condition precedent to any conviction, was, many times before and afterwards.

And for the fourth time, as if to clinch it, he charges them: "If Mr. Humes got and retained the proceeds, or retained any part of it above the Notary's fee,"

What then is the only sole and solitary condition upon which he puts the case to them on? *"—then he is guilty"*

This time does the trial court leave it to the jury to find whether or not the defendant belonged to that class of persons who would be within the provisions of the statute, and his guilt or innocence depend primarily on that as a condition precedent to their right to convict him? No. The trial court has long since in his charge three distinct times passed that issue of fact by finding it himself and so charging the jury, and now he tells them if Mr. Humes retained it, he is guilty.

The trial court has changed it—defendant's guilt or innocence now rest with them alone on the solitary issue of fact as to whether or not he retained it.

Does the trial court tell them this time "leaving the jury free to find for itself, the court is of opinion?" No. Leaving out of consideration all things else—he says if Mr. Humes retained it, he is guilty.

He says next: "whereas if Anderson got it, that is the end of the case, so far as that count is concerned."

"Or if under the rule stated you have a reasonable doubt about how that is, the defendant is entitled to an acquittal."

Do these two charges look much like leaving the jury free to find for itself, or that the trial court could be much of the opinion that the jury were left free to find for itself whether or not the defendant was instrumental in prosecuting these claims for pensions before the Pension Office?

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Again he says:

"So that did he withhold from Anderson all or any substantial part of that pension?"

"If so, he is guilty and you should convict him."

"If not, or you have a reasonable doubt, acquit him."

Do these three charges look much like the jury were left free to find for itself, or that the court was simply expressing an opinion as to whether the defendant was instrumental or not in prosecuting these claims for pension before the Pension Office?

Could language be plainer, showing that the court had time and time again in his charge taken away from them all consideration of such fact, and had time and time again so charged them?

In fact, there was no limit upon the charge, and if one was intended it is strange indeed that so many times the limiting words should have been omitted altogether.

If you examine the charge again you will readily see the plain meaning of it was to the jury this: I charge you that taking all the evidence in consideration, both the Government's and the defendant's, written and oral, the defendant was instrumental in prosecuting these claims for pension in such sense that if he withheld the money he would be within the provisions of the statute and guilty.

If the trial court intended to leave the jury free to find for itself and simply to express his opinion, that is reversable error under the repeated decisions of this court, cited beyond, where it is the finding of the primary fact.

But the use of the expression, leaving the jury free to find for itself, the court is of opinion, is a meaningless nothing when called a limitation on a charge where the judge told the jury that from all the evidence, the Government's and defendant's, written and oral, the defendant was instrumental in prosecuting these claims in such sense that if he withheld the money he would be within the provisions of the statute and guilty.

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His reference to it as both the Government's proof and defendant's, written and oral, but fixed it more firmly in the minds of the jury as settling the primary fact by the judge in his charge to them. After stating it in such unqualified terms, if he had said a thousand times, leaving the jury free to find for itself, the court is of the opinion, etc., how was it possible for him to have effaced from their minds the fixed fact as he had stated to them he had found it?

In Starr v. U. S., 153 U.S., 626, this court, by Mr. Chief Justice Fuller, called attention to the fact that there were limitations on the power of a Federal court in commenting on the facts of a case, when instructing the jury, *limitations inherent in and implied from the very nature of the judicial office.*

In Reynolds v. U. S., 98 ib., 168, this court, by Mr. Chief Justice Waite, also said on the same subject: "Every appeal by the court to the passions or prejudice should be promptly rebuked, and *it is the imperative duty of the reviewing court to take great care that wrong is not done in this way.* . . . ."

In Hickory v. U. S., 160 ib., 425, this court say: "Admonished by the duty resting on us in this regard, we feel obliged to say that the charge which we have been considering *crosses the line which separates the impartial exercise of the judicial function from the region of partisanship where reason is disturbed, passions excited, and prejudices necessarily called into play.*"

The court in the case at bar first stated the true rule of law to the jury: That as a condition precedent to conviction they must find as a fact that the defendant was the agent, attorney or any other person instrumental in prosecuting these claims for pension before the Pension Office.

The defendant could not be within the statute and punished for a violation of law, if he violated it, unless the jury first found that he belonged to this class. Yet

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in the face of so plain a law the judge finds this fact for them.

If he intended to leave the jury free to find for itself and only to express an opinion to which they should pay not the least bit of heed in the world, why did he tell them,

"*Now, desiring to get the jury down to the real issue in this case?*" Why he himself had twice before charged them that there were

two real issues in this case.

If he intended to leave to them the finding of the

two real issues in this case,

why did he tell them:

"*Now, desiring to get the jury down to the real issue in this case?*"

What had he done with the

other real issue in this case?

If he intended to leave the jury free to find for itself, why in his very next breath did he say:

"*That brings you to the fact, then, of whether or not he did withhold these pension claims?*"

What has the judge in this part of his charge done with

the other real issue in this case?

Then he says,

"*and that is the real issue.*"

Why we are told he intended to leave the jury free to find for itself.

If so, what has he done with the

other real issue in this case?

If he intended to leave the jury free to find for itself, why did he say next, "If Mr. Humes got and retained the proceeds, or retained any part of it above the notary's fee, then he is guilty."

What did the Judge do with the

other real issue in this case?

Not only did the trial court usurp and invade the

province of the jury in this case, and find the first fact for them that he himself had twice before charged that they themselves must first find before there could be any conviction, but he determined for them and so charged them what that fact was, when it was the basis of this accusation—the primary fact—condition precedent to any conviction. In short, if he had reversed his charge and found for them, and so charged them, that from all the facts in the case, the Government's proof and defendant's, oral and written, defendant was in fact guilty of wrongfully withholding pension money from pensioners, the jury could not find guilty unless they found defendant was the agent, attorney or other person instrumental in prosecuting these claims for pension before the Pension Office.

Unless he belonged to that class they could not convict him, although he admitted he withheld the money. Yet the trial court usurped and invaded the province of the jury to such an extent as to tell them what that fact was.

He, in effect, charged the jury that the defendant belonged to that class, and as such he was guilty.

The court, if the defendant had been on trial for murder, had just as well charged the jury he was satisfied, from all the facts, the defendant had done the killing, and their only province was to return a verdict of murder in the first degree. The effect of it is, the defendant has not been tried by the jury. He has been tried by the court and found guilty by the court. He has been deprived of his liberty without due process of law.

The court charged that the defendant was instrumental in prosecuting these claims for pension in the face of the fact that the *jury*, on the former trial on counts two and four of this very indictment as to these very same two, Anderson and Bloodson, *found the defendant not guilty* —found that he was not the agent, attorney or any other person instrumental in prosecuting these very claims for

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pension of either of them, and did not retain (withhold), demand or receive $486.40 from Anderson, or $517.20 from Bloodson, or any part thereof, greater compensation, etc. In disposing, on motion for new trial, of this objection, the court still said he only "*expressed to the jury the opinion that upon defendant's own testimony*"—R., p. 15. —(which was his evidence, that all he did was, as U. S. Commissioner, to administer oaths to them to their vouchers and so certify as such officer under seal, and in this he was fully corroborated by the vouchers themselves and by both Anderson and Bloodson).

"*He was instrumental in the prosecution of the pension, so far as to make him liable.*"—R., p 15.

This shows, we respectfully submit, an admission by the court that in this he usurped and invaded the province of the jury,

"but left the jury free to find the fact," he says again—R., p. 15.

Left the jury free to find what fact? One that he had told them how to find? How much freedom could they or would they exercise in finding a fact the trial court had already forestalled them by telling them how to find it? He says further, "I am unable to think now that there was any controversy whatever over this proposition, considered with reference to the proof in the case." The court was right about this, namely, that the defendant denied all the way through that he had any connection whatever with these claims, except to administer the oaths to the parties to their vouchers and to so certify in his purely official and ministerial capacity as U. S. Commissioner, under seal. All the vouchers themselves showed this, and Anderson and Bloodson both swore it. All the proof in the case, as the judge himself says, both the Government's and the defendant's, oral and written, showed the fact this way. But still it was a fact to be determined, and so long as it was, it was for the jury, and the court had nothing to do but to leave the

jury untrameled, by any opinions of his, to find how it was.

He says further: "There was no contention in the argument as to whether the defendant was agent or attorney."—R., p. 15.

This is surely the truth—all the proof showed that the defendant was not, but that others were, and it was certainly the duty of the court, this being the fact, to have charged the jury that all the proof, both the Government's and the defendant's, oral and written, showed that the defendant was not the agent or attorney, but that Powers and Chiles were.

He says: "but only whether he was instrumental." —R., p. 15.

But however it was, and if it was so, it was a fact the finding of which was the especially and peculiarly the province of the jury. And it was the right of the defendant to have the jury find that fact, untrameled by any opinions of the court.

The words of 5485 are, "Any agent or attorney, or any other person instrumental in prosecuting any claim for pension," etc.

And in the Benecke case this court add "before the Pension Office." "or any other person instrumental"— in what sense? In the sense of being and acting as any agent or attorney acts.

In the sense of prosecuting any claim for pension as any agent or attorney is instrumental in prosecuting claims for pension before the Pension Office.

So that you have plain words, going both before and after those "any other person instrumental" that limit and show what that means.

Was the defendant agent or attorney or any other person instrumental in prosecuting the claims for pension before the Pension Office, of Anderson and Bloodson, and did he demand, receive and retain (withhold) from them, or either of them, for his

services and instrumentality in prosecuting said claims for pension before the Pension Office—greater compensation, etc., to-wit: $486.40 from Anderson, and $517.20 from Bloodson, or any part thereof?

No. Not guilty, say the jury by its verdict.—R., p. 12.

Was the defendant the agent or attorney? He was not, says the Judge.—R., p. 15. Or any other person instrumental in prosecuting the claims for pension of Anderson and Bloodson before the Pension Office?

He was, the trial court said to the jury, as a fact in his charge.—R., p. 176.

In the Benecke case is found one of the tests of whether a person is or not within the statute.

Is he a person prosecuting claims for pension before the Pension Office?

The defendant was not. Powers and Chiles were the agents, attorneys and other persons instrumental, etc., and who in fact procured the granting of these very pensions for these very parties.

The essence of the offense is wrongful withholding.

The court, in its charge to the jury, in the case at bar, had told them nine times the defendant was instrumental, etc.

The court found this fact for the jury and so charged them, in the very face of the fact that the jury, on the first trial, on counts two and four, as to these very two, Anderson and Bloodson, without any such finding by the then trial court and charge, and when it was left to them to find, had found the defendant not guilty—that he was not instrumental and did not as such prosecute these very claims for pension of Anderson and Bloodson before the Pension Office; and that he did not demand, receive or retain (withhold) from them, or either of them, as such, for his services or instrumentality in prosecuting said claims for pension of Anderson and Bloodson before the Pension Office, any or greater compensation, etc., to-wit: not $486.40 from Anderson or $517.20 from Bloodson, or any part thereof.

5485 states this offense—wrongful withholding—unlawful retaining—in two aspects, described and punished in the same sentence and with the same penalty.

Its words are:

"Any agent or attorney, or any other person instrumental in prosecuting any claim for pension . . .

First, "who shall, directly or indirectly, contract for, demand or receive or retain any greater compensation for his services or instrumentality in prosecuting a claim for pension . . . than" allowed by law, i. e., $25 fee, a case under this act where fee agreements are filed.

Second, "or who shall wrongfully withhold from a pensioner or claimant the whole or any part of the pension or claim allowed and due such pensioner or claimant," etc., shall, etc.

In short,

First, retaining (withholding) any greater compensation, etc., and,

Second, wrongful withholding.

In short, the jury on the first trial, having found the defendant not guilty on counts two and four as to Anderson and Bloodson, both in that he was not the agent or attorney, or any other person instrumental, and was not instrumental in prosecuting their claims, and did not demand, receive or retain (withhold) from them, or either of them, anything—greater compensation, etc.—not $486.40 from Anderson, and not $517.20 from Bloodson, or any part thereof—it was certainly, to say the least of it, the duty of the court to have left again to the jury the finding of the fact of whether or not the defendant was the agent, attorney or any other person instrumental in prosecuting these claims for pension; and not to have found that fact for them and so charged them contrary to the way they first found that fact themselves, and when they were left by the then trial court to find it for themselves.

Does not the finding of the fact that he, on counts

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two and four, was not guilty—was not the agent, attorney or any other person instrumental, and was not instrumental in prosecuting these claims for pension of Anderson and Bloodson before the Pension Office, go further? Does it not go to the extent that the jury by its verdict have found and fixed the fact that he was not the agent, attorney or any other person instrumental, and was not instrumental in prosecuting these claims for pension of Anderson and Bloodson before the Pension Office?

Does it not go further? As that jury found that the defendant was not the agent, attorney or any other person instrumental, and was not instrumental in prosecuting these very claims for pension, and did not in fact demand, receive or retain (withhold) from Anderson $486.40, or of Bloodson $517.20, or any part thereof, greater compensation, etc., that the Judge on this trial should have charged the jury that the defendant was not the agent, attorney or other person instrumental, and was not instrumental in prosecuting these claims for pension before the Pension Office, and had not demanded, received or retained (withheld), wrongfully withheld $486.40 from Anderson, or $517.20 from Bloodson, or any part thereof.

In short, that the defendant was not guilty in fact as well as law. The jury having found that the defendant was not the agent, attorney or any other person instrumental, and was not instrumental in prosecuting these claims for pension before the Pension Office within the statute, and that in fact he had not retained (withheld) $486.40 from Anderson, or $517.20 from Bloodson, or any part thereof, he was therefore not guilty, in fact as well as law.

It may be suggested that the offense is stated in the statute in two ways. If that be true are they not both absolutely dependent upon identically the same two facts?

First, "was he agent, attorney or any other person

instrumental in prosecuting claims for pension before the Pension Office? and,

Second, If he was, did he wrongfully withhold—retain?

The essence of the offense in both aspects is wrongful withholding—retaining. Whether it was committed by retaining (withholding) greater compensation, or wrongful withholding, the offense is still the same.

Whether it be the one—retaining (withholding), or the other, wrongful withholding, the primary question in both is—was he agent, attorney or any other person instrumental in prosecuting claims for pension before the Pension Office?

If he does not belong to that class, then the offense is not committed; it does not make any difference if he retained (withheld) greater compensation or how. It is not retaining (withholding) or wrongful withholding within the sense and meaning of the statute as twice construed by this court in the Ballew and Benecke cases.

If the jury once, as to the same two, Anderson and Bloodson, find the fact that the defendant on counts two and four was not agent, attorney or any other person instrumental, and was not instrumental as such in prosecuting their claims for pension, and did not retain (withhold) $486.40 from Anderson, or $517.20 from Bloodson, or any part thereof, greater compensation, how can the jury, on the same offense, in the same indictment, as to the same two, Anderson and Bloodson, be allowed to find and report the same fact as having been found otherwise by them under a charge where the court itself found and charged them nine times what the first fact was, and in effect charged them that the defendant was guilty on the last fact that he apparently left them to find?

Remember that in this same indictment of nine counts, on two counts the Government, after some days' trial, declined to prosecute, and on five others the defendant was found not guilty, four times by the first jury and

once by the second, although the court in words found for them the first fact and so charged them, and in effect charged them that the defendant was guilty on the last fact, and so the verdict of guilty was reported by the jury.

I may better illustrate the idea this way: A is indicted for murder. The indictment embraces all four grades; murder in the first degree, second degree, third manslaughter, and, fourth, assault. The essence of the crime is murder. All four grades rest on the same question of fact, did A kill B? On the first trial the jury returned a verdict of not guilty, specifying they found the defendant not guilty of the second, third and fourth grades of the crime. A is called for trial before the jury for the second time on the same indictment, and on the first grade of the crime—murder in the first degree.

Is it possible that any court would hear him tried by the jury a second time on the question of murder, and would hear the court on the second trial charge the second jury that the defendant was guilty of murder in the first degree—the very highest grade of the offense? Without an instant's hesitancy, all will say no.

Where is the difference between the two cases?

In the case at bar, the primary question of fact—condition precedent to the right to convict—was, was the defendant the agent, attorney or any other person instrumental in prosecuting the claims for pension, of Anderson and Bloodson, before the Pension Office? and

Second, If he was, did he retain (withhold) $486.40 from Anderson or $517.20 from Bloodson, or any part thereof?

The indictment charges the offense in two forms: Count one charging wrongful withholding $486.40 from Anderson. Count two is the same except that it charged the retaining (withholding) of said $486.40 from Anderson, greater compensation. As to Bloodson, it was the same, being counts three and four of $517.20.

On the first trial, on a charge by the then court, leav-

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ing to the jury the finding of both the facts, they found the defendant not guilty, specifying counts two and four. That he was not the agent, attorney or any other person instrumental, and was not in fact instrumental, in prosecuting the claims of Anderson and Bloodson for pensions before the Pension Office, and that he did not demand, receive or retain (withhold) from either of them any or greater compensation, not $486.40 from Anderson or $517.20 from Bloodson, or any part thereof.

The case comes on for the second trial on counts one and three. The same identical questions of fact again.

First, was the defendant, the agent, attorney or any other person instrumental in prosecuting the claims for pension of Anderson and Bloodson before the Pension Office; and,

Second, if he was, did he wrongfully withhold $486.40 from Anderson or $517.20 from Bloodson, or any part thereof?

Is it possible that the court will hear the defendant tried by the jury the second time on identically the same two questions of fact, i. e., was he the agent, attorney or any other person instrumental in prosecuting the claims for pension of Anderson and Bloodson before the Pension Office? and if he was, did he wrongfully withhold $486.40 from Anderson or $517.20 from Bloodson, or any part thereof; and will hear the court on the second trial charge the second jury and find for them nine times the fact that the defendant was instrumental in the prosecution of these claims in such sense that if he withheld the money he would be within the provision ot the statute and guilty, and in effect that he was guilty, of wrongfully withholding the full amounts claimed?

In the illustration given of A tried for murder, how promptly would it be said on all sides that no person shall be subject for the same offense to be twice put in jeopardy.

How can it be said in the case at bar that that con-

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stitutional provision has not been violated on the last trial for the liberty, and it were better for him, for the life of the man?

These two charges that we have been discussing are so inseparably linked together that a verdict of not guilty in one must be followed absolutely by a verdict of not guilty in the other.

That is, in every case where, on the primary fact, the person is found not guilty. To make plain what I mean, if the party indicted is found not guilty—that is, that he was not the agent, attorney or any other person instrumental in prosecuting claims for pension before the Pension Office—he is then not within the statute, and cannot be guilty, whether the charge be wrongful withholding or retaining (withholding) greater compensation.

The Ballew case cited helps to illustrate this view. He was indicted for the offense in both aspects—wrongful withholding and retaining (withholding) greater compensation. He was the attorney, agent and person instrumental in prosecuting that claim for pension before the Pension Office. Of this there was no question. He had duly qualified, and was recognized by the Pension Office as the attorney, etc., of the woman from whom he withheld, and he was paid the $25 fee as such by the Pension Commissioner's order, with a check from the U. S. agent making payment of the pension allowed and due. The check for fee was to Ballew's order. He was enrolled in the pension bureau as her attorney, etc.

He was found guilty by the jury on both counts.

Why? Because the primary question settled, i. e., that he was the agent, attorney and other person instrumental in prosecuting her claim for pension before the Pension Office, the jury could well say that as such he retained (withheld) the money—greater compensation or wrongfully withheld it; or both retained it—greater compensation and wrongfully withheld it.

They could not find he did not retain (withhold) it —greater compensation, and then find that he wrongfully withheld it.

If he was the attorney, agent and other person instrumental in prosecuting her claim for pension before the Pension Office, then the sole question was, had he been guilty of wrongful (withholding) retaining? Then the question was how, under the statute? And the answer was bound to have been, under both aspects. How could you tell under which one? He was guilty of wrongful (withholding) retaining, and no power on earth could tell whether it was under the aspect of retaining (withholding) greater compensation or wrongful withholding.

But he could not be guilty of retaining (withholding) greater compensation and yet be guilty of wrongful withholding.

He was innocent or guilty of wrongful (withholding) retaining. If guilty, he was bound to have been guilty under both aspects of the statute. If not guilty, he was bound to have been not guilty under both aspects.

And the opinion of this court in the Ballew case sustains this view. How? This court held him not guilty of wrongful withholding. Why? Because he could only be guilty of wrongful withholding if he was the attorney, agent or other person instrumental in prosecuting the claim for pension before the Pension Office if he gets hold of money *due* the pensioner from the United States before the money passes into her possession and control. As it had in his case been paid over to her—was not *due*—he could not be guilty of wrongful withholding. But he was guilty of retaining (withholding) greater compensation. Why? Because the statute under which he was indicted inhibits, as this court say, the payment thereof at any other time or in any other manner than as therein provided. Thus making it clear that where it was intended to punish the offense of receiving an illegal fee, as well after the payment of the pension to

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the pensioner as before the receipt by him of the money, the intention was unequivocally conveyed, this court there say.

Again, why do I say that it was wrong for the court in the case at bar to usurp and invade the province of the jury, and find for and charge it that on the first question of fact submitted by him the defendant was instrumental in prosecuting these claims for pension before the Pension Office in such sense that if he withheld the money he would be within the provision of the statute and guilty? Because in Bloodson's case, for years before he knew the defendant at all, his pension had been granted. He and Anderson both had attorneys, agents and persons instrumental in prosecuting their claims for pension before the pension office of record, and enrolled in the pension bureau, who were, on the granting of these pensions under act June 27, 1890, on the Pension Commissioner's orders by the United States agent making payment of the same, paid the $10 fees allowed by that act. Anderson's was Chiles. Bloodson's Powers. These were the uncontroverted facts on this question. As the judge said, the Government's proof was both written and oral. And was it not the duty of the court on these facts to have charged the jury that the defendant, as shown by those facts proved by the Government, was not the agent, attorney or any other person instrumental in prosecuting these claims for pension before the Pension Office, and so not within the statute, and not guilty in fact and law.

This record proof showed that these very claims were filed by Powers and Chiles in the Pension Office as the agents, attorneys and other persons instrumental in prosecuting the same for Anderson and Bloodson before the Pension Office. They were so recognized through a long series of years. They qualified in that bureau as such. And when these pensions were granted without making any inquiry, under the orders of the Pension Commissioner, these two fee checks were sent these agents,

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attorneys and other persons instrumental in prosecuting these claims for pensions before the Pension Office, to New Orleans, their homes. And this although the person holding the office of Pension Commissioner had changed several times, from the filing to the granting of the pensions, with the incoming and outgoing administrations. Both of these claims being filed in 1890. From this proof of the government, was it not the duty of the court to have charged the jury on these facts, both written and oral, most of it matters of record from the pension bureau, that the Government, by that proof, its acts as shown by the records in those two cases, was estopped, to deny that Powers and Chiles were the agents, attorneys and other persons instrumental in prosecuting these claims for pensions of Anderson and Bloodson before the Pension Office; that the Government under those facts would not be heard, could not be heard, to say that any other person was the agent, attorney or other person instrumental in prosecuting the claims for pension of Anderson and Bloodson before the Pension Office?

Did not the court upon these further facts err in the face of them in charging the jury that the defendant, as the court had found as a fact, was instrumental in prosecuting these claims for pension of Anderson and Bloodson before the Pension Office?

And he also erred in refusing to charge just the very opposite as set out in the III assignment of error stated further on.

And if subject to the penalties of the statute, it would seem but just that the defendant should be entitled to what of benefit there is in it. And if he was the attorney, agent or any other person instrumental in prosecuting these claims for pension before the Pension Office of Anderson and Bloodson, and the Pension Bureau knew this so well in spite of all the facts to the contrary, both physical and record facts, and all the law, why did the Pension Commissioner recognize and pay the fees in these

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cases to Powers and Chiles; if he knew so well that the defendant was the agent, attorney or any other person instrumental in prosecuting these claims for pension before the Pension Bureau, and no one could have known it better, if it was a fact, or so well—why didn't the Pension Commissioner order these fee checks paid to defendant?

The law says under the Pension Commissioner's orders that these fee checks must be paid to the agent, attorney, or any other person instrumental etc., and so enrolled and recognized; and if so, and the defendant was such, did not the Pension Commissioner overlook ~~the law~~ the law himself in paying them to Powers and Chiles; in other words, if in the great zeal shown in this case until it was about changed from what it ought to have been, a prosecution, to a most bitter persecution, so that, as the record shows, four special examiners, so called, of the Pension Bureau stayed in the court room all during this trial, and that they conducted their examinations in secret, after the manner of the Star Chamber proceedings of England and the hated days of the Spanish inquisition? And it does seem that the American idea of fair play—not being spies—was hardly shown in a proceeding such as this, of so much over-zeal to consign a fellow citizen to a felon's doom and heap eternal infamy and shame on all his, in the face of the law and the facts, that they were all unwilling to allow him what under the law even was his poorest and least privilege. But the defendant stands now far above the reach of all such passions and prejudices, and where all are equal—the humblest private citizen as well as the very highest officials, who may feel they are clothed with so much power in their brief authority. He stands now before the final and highest court in the world, and his case will receive at their hand surely that calm deliberation and consideration which those involving the life and liberty of the citizen should have.

Again, this record shows that the defendant was a

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United States Commissioner, and had never done anything for Anderson or Bloodson except to administer oaths to their vouchers, and so certify in his official capacity under seal.

Section 5498 R. S. prohibits every United States officer from acting as agent or attorney in prosecuting any claims against the United States, and provides a heavy penalty, and still it has the stipulation that no such officer shall act as an agent, attorney, etc., "otherwise than in discharge of his proper official duties."

And this record shows that the defendant never did anything except within this statute, i. e., "otherwise than in discharge of his proper official duties."

And the court should have so charged the jury. And should not, in the face of this fact, have charged the jury that the defendant was instrumental in prosecuting said claims for pension before the Pension Office.

As to the proper construction of 5485, the section here involved, there are three of these statutes: First, the one here; next, that construed in Ballew's case; and the *last*, section 4, act June 27, 1890; all are for the protection of a certain class—pensioners. And they are all aimed at a certain class—any agent, attorney or any other person instrumental in prosecuting claims for pension before the Pension Office. All three are to punish, what? A single offense. What? Keeping back money from a pensioner. You find this offense aimed at in the double aspect. How? As to being kept back greater compensation, and keeping back. Whether you call it withholding, which means retaining, or retaining, which is the equivalent of withholding, the above is the substance, and shows what the offense aimed to be punished is. Many words whose meaning is the same may be used to name the same offense, as in these statutes, where retaining is used in speaking of keeping back money—greater compensation—and withholding where it is simply keeping it back. True, you find in that clause which aims at pun-

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ishing where it is keeping back money—greater compensation—the terms used are more comprehensive. It covers the offense in many different ways. If he "directly contract" he violates this first clause of the statute. If he "indirectly contract" he violates it. If he "demand" he violates it. If he "receive" he violates it; the idea being, even though it be a voluntary payment. Finally, if he "retain" he violates it—and here it may be contrary to the wish of the pensioner or with his consent. Yet as to the second clause it is limited to the single case of wrongful withholding.

You will see, too, in the indictment the terms used in the first set of counts are "wrongful withholding," and in the second "unlawful retaining." Could it be possible to find two terms of four words that are more nearly identical? So that, examining these statutes in every view, and noting the words withholding and retaining mean the same, I see no higher reason for the use of the different words than to avoid tautology if both clauses had the same word. And I am borne out in designating the offense withholding by the opinions in the Ballew, Benecke, Irwin and Frisbie cases.

5485 is less comprehensive than the other two statutes. Section 4786 as amended is extended. So is section 4, act June 27, 1890. The purpose in referring to these statutes is to show the marked differences in them.

In looking to the proper construction of a statute, that the whole of it will be considered, is a cardinal rule of construction. If there are any words of doubtful construction, that the words used in the same sense which are of plain meaning will be looked to in construing what the words of doubtful meaning are, is another cardinal rule.

The plain meaning of the words in 5485 is that—any agent, attorney or any other person instrumental (who is the means) in prosecuting any claim for pension (before the Pension Office), who shall retain any greater

compensation for his services or instrumentality (agency) in prosecuting any claim for pension (before the Pension Office).

Instrumental in what? In prosecuting a claim for pension.

And the opinions in the Ballew and Benecke cases show these words have a definite signification. They make it applicable alone to certain individuals. The words limit it to that class.

And so the word prosecuting has a definite signification in these statutes. It means to institute and carry on a legal proceeding.

Here, then, is any agent, attorney or any other person (in the sense as an agent or attorney) instrumental—who is the means) of instituting and carrying on this legal proceeding to obtain a pension before the Pension Office.

This is the certain class who fall within the statute, those prosecuting claims for pension before the Pension Office, as this court said in the Ballew and Benecke cases.

And the law and rules of the Pension Department have requirements that must be complied with before one can become agent, attorney or any other person (as attorney and agent) instrumental in prosecuting claims for pension before the Pension Office. He must take the oath of allegiance—3487.

The regulations of the department provide that any attorney, agent or any other person who desires to represent claimants before it or one of its bureaus must file a certificate, etc.

"An applicant for admission to practice," it says, must address a letter to the Secretary of the Interior, inclosing the certificate and oath required.

He must state if he is a United States officer, etc.

On this being granted he shall be recognized, enrolled and permitted to appear in any case.

This is the class who alone are within the statute.

And in these regulations of the department you have the practical construction that was given by it of these very statutes.

And it was a construction by one who was afterwards Associate Justice of this court. And it is not flattery to say he was a great jurist and statesman who had spent years in making these laws. I refer to Mr. Justice Lamar. No one, therefore, was more familiar with them than he, or better able to say what they meant.

No United States officer can be any agent, attorney or any other person (as agent or attorney) instrumental in prosecuting these claims for pension before the Pension Office, under the regulations of 5498. He is prohibited from being. He can do nothing "otherwise than in discharge of his proper official duties." If the defendant had applied as required, would they have granted him a permit to practice? No. It was impossible for him to have done so, because he was a United States Commissioner and ineligible, and no one knew it better or had fixed it more certainly than the Pension Bureau by its own regulations.

It can't be possible that the words "any other person instrumental in prosecuting any claim for pension before the Pension Office mean any one that administers in his purely official and ministerial capacity all oaths, and so certifies under his seal of office.

This trial court, if such a construction as it has given is the right one, over-rules the opinions in the Ballew and Benecke cases, which held the statutes alone applicable to a certain class of individuals; and makes it applicable to every one who puts his hand on—touches—a pension claim in any way.

The word due is read out of the statute. If he got the money before or after it passed and was paid to the pensioner and went into her possession and under her absolute control, if he obtained the money by false pretense, he is within the statute. Whether it is larceny and

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not embezzlement he is within the statute. The guardian is just as much guilty if he got the money by fraud after he paid it over when his ward was grown as when he was a minor. Those prosecuting claims for pension before the pension office mean nothing. The statutes have opened, according to this rule of construction by this trial court, to let in all the world. There are no limitations on the words or the provisions of the statutes. The verdict of not guilty on the facts as found by the first jury is nothtng. They must report guilty whether he is or not. It seems to us that this is the only line of reasoning to be deduced from such a charge as that of this trial court in the case at bar.

Two marked reasons that show how definite and significant are the meaning of the words in these statutes are those to be found in the opinions in the Ballew and Benecke case.

In the Ballew case this court say "certain persons standing in a fiduciary relation to the pensioner."

Here is found one of the crucial tests of whether the person is within the provisions of the statute.

Does he occupy such a relation to the pensioner and his claim as that he might lawfully obtain possession of the same from the government, and upon whom rested the duty of paying it over to the pensioner?

Is he one of those persons prosecuting claims for pension before the Pension Office?

If yes can be answered to these questions, then he is within the provisions of this statute. If no, then he is not.

This court in Ballew's case say further:

"If withholding had been considered as applicable to the obtaining of pension money from the pensioner by false pretenses, the limitation as to particular persons would not have been enacted.

"Indeed, to construe the word 'withholding' as relating to money received from a pensioner, not only

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reads the word 'due' out of the statute, but also leads to the inevitable conclusion that Congress, whilst intending to make it an offense to obtain from a pensioner money by false pretenses, has yet confined the offense to particular individuals, and permitted all others to commit with impunity the crime it was intended to punish.

"It also follows, if the statute be construed as embracing money obtained from a pensioner by false pretense, that the act forbids withholding money thus obtained, but does not forbid or punish the act of obtaining money by false or fraudulent pretense.

"These reasons make it clear that the purpose of the statute in punishing a withholding by certain persons standing in a fiduciary relation to the pensioner is consistent only with the theory that Congress was legislating to prevent an embezzlement of pension money, not a larceny thereof from the pensioner, or the obtaining of the same from him by false pretenses."

This further from the opinion shows that the words of these statutes have a definite signification.

"The refusal of the court to give the charge asked, and the charge given, proceeded upon the theory that although pension money was actually paid over to the pensioner, and by her deposited in bank, the obtaining thereafter of such money from the pensioner constituted a withholding under the statute. . . The word 'withholding' has a definite signification: we think contemplates, as used in the statute, . . . not the fraudulent obtaining of money from a pensioner, but the withholding of the money from, before it reaches the hands of the pensioner and passed under his dominion and absolute control. The context of the statute supports this view, for its penalty is imposed for the wrongful withholding of the whole or any part of the pension claim allowed and due such pensioner, and not for the wrongful obtaining of the same.

"The fact that the offense of withholding is limited to any agent or attorney or other person instrumental in

prosecuting any claim for pension demonstrates that Congress intended to legislate merely against the wrongful withholding by certain individuals who, by reason of their relation to the pensioner and his claim, might lawfully obtain possession of the same from the Government and upon whom rested the duty of paying it over to the pensioner. . . . . .

"This construction of the statute is further supported by reference to act Mar. 3, '73, c. 234, 17 Stat., 566, in sec. 31 (p. 575) of which is contained the provision making it an offense to withhold pension money. In juxtaposition to that sec. is sec. 32, being 4745.

"The signification which we affix to the word 'withholding' is also shown to be the one intended by Congress, by the previous portion of the paragraph act 84, which not only makes it an offense to directly or indirectly contract for, demand, receive or retain any greater compensation for services, or instrumentality in prosecuting a pension claim than allowed by the act, but specifically inhibits the obtaining of payment thereof 'at any other time or in any other manner' than as provided in the act, thus making it clear that where it was intended to punish the offense of receiving an illegal fee, as well after payment of the pension to the pensioner as before the receipt by him of the money the intention was unequivocally conveyed. The clause 'payment thereof at any other time or in any other manner than is herein provided' was not contained in the act 73, sec. 5485 R. S., but was first embodied in the act 84; whereas the provision as to withholding of a pension 'due' the pensioner.

"In the very next sentence of act 73, following the designation of the offense of withholding, there is a provision affixing a penalty to the offense of embezzlement of pension money by a guardian from his ward.—Sec. 4783 R. S. It may be remarked in passing, that it would be as reasonable to argue that one who had fully accounted

as guardian and paid over to his ward the balance due, when the ward had attained majority, could be prosecuted under sec. 4783, if, after such accounting and payment, he fraudulently obtained money from his former ward which might from the proof appear to be a portion of the balance so paid on the accounting, as to contend that when a pension allowed and due from the Government had been paid to the pensioner, it continued to be 'due' in any money transaction between the pensioner or his former agent or attorney.

"The instruction given by the trial court that there was a withholding under the statute, if the transaction in this case was a continuous scheme designed by the accused for the purpose of getting into his possession a portion of the pension money, made his guilt or innocence depend not alone upon whether there was a scheme to defraud. *It was tantamount to instructing the jury that they should convict, even though they were satisfied that the money had not been withheld*, if they believe that before payment over, a scheme to defraud had arisen which was carried out after the pensioner had received the amount of the pension and after it had been by her deposited in bank, and created between her and the bank the legal relation of debtor and creditor. Of course, if the indictment had been so framed as to bring the facts, which it is alleged constituted a withholding, within the reach of the first clause of the statute, which forbids the taking of illegal compensation, the instruction given by the court would have been sound. In that case, the taking of money is made criminal, whether done before payment to the pensionor, at the time of such payment, or any other time; withholding, on the contrary, is confined to money due, which, in no sense, embraces that which has been actually paid over to a pensioner and has passed under his control. However, much pension money, even when taken into possession of a pensioner, may retain its identity for certain purposes, we do not think, for the

reasons just stated, that this instruction given was sound law. The elementary rule is that penal statutes must be strictly construed and it is essential that the crime punished must be plainly and unmistakably within the statute. . . It follows, therefore, that the instruction asked was wrongfully refused and the instruction given was erroneous, and there was error in conviction as to the first count in the indictment."

Another strong reason I submit is shown by this record which puts it beyond question that the trial court did not leave the jury free to find for itself the first question of fact as to whether defendant was any other person instrumental in prosecuting said claims for pension and only meant to express an opinion to which they should pay not the least heed.—R., p. 179.

The trial court said: "Now, I have undertaken, somewhat *tediously*, to direct your attention to the proof on the other question of fact as to whether or not defendant withheld the money.

And as he there states he did talk a long time on his view of this question of fact.

But take his charge, and with a judge that shows such great fondness for talking so long and so much on his own one view of one fact that he himself says he has done so "*somewhat tediously*," and you will not find one word, one syllable, one single letter, in this long ten-page printed charge; not one single reference or mention of the facts as to whether or not the defendant was any other person instrumental in prosecuting these claims for pension "before the Pension Office."

Would this be true, could this be true, with a judge shown so fond of commenting at such great length upon his own view of a fact, unless he felt sure he had fixed it by his words so there could be with the jury no question about it or how it was?

Anderson testified he made his application with Dedrick.—R., p. 19.

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His voucher showed Chiles was his attorney of record and paid the fee.

Bloodson swore same.—R., p. 57. Powers was his attorney, as his voucher showed, and got the $10 fee.

Defendant swore he never was a pension attorney.—R., p. 113.

This trial judge says: "There was no contention in the argument as to whether the defendant was agent or attorney.—R., p. 15.

Defendant also swore that all he did was to administer to the parties the oaths to their vouchers as United States Commissioner and so certify under his seal in his purely official and ministerial capacity as such.—R., p. 118. Bloodson's pension was granted as shown, Dec. 11, '91. He spoke to Mr. Humes about it in the fall of 1894.—R., p. 79. His first papers were lost. How could Mr. Humes be any other person instrumental in prosecuting a claim for pension before the Pension Office where the pension was granted nearly three years before Bloodson knew Humes, or he him. And yet no comment is made on any of this proof by the trial court. And still we are told the jury was left free to find for itself and the trial court only expressed an opinion that it was intended the jury should pay no heed to.

The jury should have been left to find the facts untrammeled by any opinion of the trial court.

In Mills v. U. S., 164 U. S., 646, this court, by Mr. Justice Peckham, say. "No portion of the charge of the court, under such circumstances, can be said to be harmless if it did not state correctly and fully the law applicable to the crime, even although it may be urged that in other portions of the charge the correct rule was laid down.

"*How much of this testimony was credible, and what inference ought to be drawn from it all, were matters for the sole consideration of the jury, and the mere charge taken for proper proof of the crime on the part of the person on trial.*"

This court in Stevenson v. U. S., 162 U. S., 341, by Mr. Justice Peckham, say: "*The evidence as to a fact need not be uncontradicted, or in any way conclusive upon the subject; the proper weight to be given it is for the jury to determine. If there were any evidence which tended to show such a state of facts, ... it then became a proper question for the jury to say whether the evidence were true, and whether it shows that the crime was such. . It is difficult to think of a case . . . . that the question would not arise for the jury to answer . . . . The evidence might appear to the court to be simply overwhelming . . . . and yet, so long as there was some evidence relevant to the issue, . . . the credibility and force of such evidence must be for the jury and cannot be matter of law for the decision of the court. . . . There must, of course, be some evidence which tends to bear upon that issue. The jury would not be justified in finding a verdict . . if there were no evidence upon which to base such finding. . . . . The ruling of the learned judge was to the effect . . . . that under no view which could possibly be taken of the evidence would the jury be at liberty to find the defendant guilty of manslaughter.*"

"*The court passed upon the strength, credibility and tendency of the evidence, and decided as a matter of law what it seems to us would generally be regarded as a question of fact, viz: whether under all the circumstances which the jury might, from the evidence, find existed in the case, etc., ... and yet this question of fact is, under the evidence in the case, determined by the trial court as one of law and against the defendant . . . .* that portion of the evidence . . which might be regarded as tending to show that the defendant was only guilty, etc.

"*If there was some appropriate evidence upon that subject, its proper weight and credibility were for the jury. . . There was evidence tending to show . . . . the evidence given upon the trial tending to show the circumstances, etc. . . .*

"*Was there enough, in any view that could be taken of*

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such evidence, to require the submission of the question to the jury? We think there was, and the request of counsel for plaintiff in error should have been granted, . . but it seems to us entirely clear that there was enough to ask the jury to decide, ... upon all the evidence in the case. . . .

"The jury should have been permitted to determine the credibility of the evidence, ... would not a jury have the right to say:

"Is it not clearly a question of fact for a jury to determine and from the whole facts and circumstances the jury infers the only way to decide its condition . . . . . is to infer it from the surrounding facts, and that inference is one of fact for the jury, but taking all the evidence in this case, we think it is one for the jury to determine upon the issue.

"Who is to make the inquiry, the court or the jury under proper instructions from the court? There might be cases where the uncontradicted evidence was so clear and overwhelming . . . . that a court might be justified in stating to the jury if they found the evidence to be true, they ought to infer; but this is not such a case.

"The ruling of the trial judge in effect was to say that as matter of law there was nothing in all this evidence, if true, which would permit the jury to find that the plaintiff in error was, etc.

"Is it perfectly plain and clear, as a conclusion of law, that etc.

"If it is not to be asserted as matter of law, then it becomes a question of fact in such case, and that question must be answered by the jury.

"Whether the witnesses told the truth in regard to such circumstances is not for the court to say, nor is it for the court to decide upon the weight to be given to them if proper for the consideration of the jury.

"But why should the other issue be taken from the jury and they not be permitted to pass upon it as a question of fact?

"It cannot be properly regarded as a question of law.

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"A judge may be entirely satisfied from the whole evidence in the case, ... and yet if there be any evidence fairly tending to bear upon the issue, . . it is the province of the jury to determine from all the evidence, ... and to say what the crime was, . . the question as to which was to be credited was for the jury, and should not have been taken from it by the court, . . there was certainly sufficient evidence on that issue to render it necessary to submit it to the jury. We have no power and no inclination to pass upon that question of fact. We only decide that the question should have been submitted to the jury as well as the other question of fact. For the error in refusing to do so, the judgment of conviction must be reversed and the cause remanded to the court below with instructions to grant a new trial."

This court in Hickory v. U. S., 160 U. S., 413, say: *"The legal influence which this language must have exerted on the jury was increased by the subsequent instruction"*—as in the case at bar repeating the same thing many times as to defendant being instrumental in prosecuting these claims for pension and getting the jury down to the real issue, and did he wrongfully withhold the pension money, etc., and that being the real issue. If he did withhold, he is guilty, etc. If he did not, he is not—etc. If Anderson got the money that ends the case. If Humes got it, he is guilty, etc.

Using the words of the opinion cited: *"Putting this language in connection with the* 'many other charges,' *it is justly to be deduced that its effect was to instruct that the defendant was 'guilty,' and therefore the only province of the jury was to return a verdict of guilty."* That opinion states: *"It is true that a subsequent portion of the charge refers to evidence . . . as proper to be taken into consideration as evidence. But these qualified remarks did not recall the undue weight which the previous language had affixed to the facts to be considered by the jury."* In the case at bar the instructions complained of were tantamount to saying

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to the jury the defendant was guilty if it was not so in words. The opinion in the case cited goes along this same line of reasoning; it says: "*On this subject, also, it is true the charge thus given was apparently afterwards qualified by the statement that the jury had a right to take the fact . . into consideration, but these words did not correct the illegal charge already given. Indeed, taking the instruction . . . . . with the qualifying words subsequently used, they were both equivalent to saying to the jury that they were, in considering the facts, to give them the weight which, as matter of law, the court declared they were entitled to have, that is . . . . . so well settled as to amount virtually to a conclusive proof of guilt.*"

"In Starr v. U. S., 153 U. S., 626, in considering the power of a Federal court to comment in charging a jury on the evidence, we quoted with approval the language of the Supreme Court in Burke v. Maxwell, 81 Penn St., 150, saying: "*When there is sufficient evidence upon a given point to go to a jury, it is the duty of the judge to submit it calmly and impartially.*

"*And if the expression of an opinion upon such evidence became a matter of duty under the circumstances of the particular case, great care should be exercised that such expression should be so given as not to mislead, and especially that it should not be one-sided The charge given in this case violates every rule thus announced. It was neither calm, nor was it impartial. It put every deduction which could be drawn against the accused from the proof, ... and omitted or obscured the converse aspect. In so doing it deprived the jury of the light requisite to safely use these facts as means to the ascertainment of truth. Nor can it be considered that the language used corrected the error. . . . . Indeed, taking the language af the charge which follows the foregoing words, it must have conveyed by the strongest possible intimation the impression to the jury that the case before them was controlled by the general rule previously stated to them by the court, although other cases might be an exception to such rule.*"

"Measuring the correctness of the charge now considered by these principles and authorities, it is at once demonstrated to have been plainly erroneous."

"It magnified and distorted the proving power of the facts."

"Considering the entire context of the charge, it practically instructed that the facts were . . . . . conclusive proof of guilt."—P. 421.

Quoting from the charge of the trial judge in this case:

"You are to see whether they harmonize with this statement of this transaction as given by the defendant, bearing in mind that he stands before you as an interested witness, while these circumstances are of a character that they cannot be bribed, that cannot be dragged into perjury, they cannot be seduced by bribery into perjury, but they stand . . in opposition to and confronting this defendant, who stands before you as an interested party, the party who has in this case the largest interest a man can have in any case upon earth. While you are not to disbelieve his evidence because of that alone, you are to weigh these facts and see whether they harmonize with his statement when viewed by the light of your intelligence; and when this case is illumined by such facts, whether it is in harmony with the statements of this interested witness, or in contradiction of them."

Then this court say:

"It is apparent that this part of the charge is replete with the errors which we have already found to exist in the matter which we have already considered. But the instruction contains an additional error of so grave a nature that we call attention to it in order to prevent its recurrence.

"The manner of contrasting the testimony of the accused . . . was clearly illegal. . . . This contrast thus made could have conveyed but one meaning to the jury, that is, a warning that the testimony of the

accused was to be considered by them as of little or no weight because he could be bribed, he could be dragged or seduced into perjury. Such denunciation of the testimony of the accused is without legal warrant. Indeed, this instruction, besides giving rise to this error, was also, if possible, more markedly wrong from the implications which it conveyed to the jury. It substantially said to them the circumstances . . . . cannot be bribed, but the defendant can be; therefore, you must consider that these circumstances outweigh his testimony, and hence it is your duty to convict him."

In Allison vs. U. S., 160 U. S., 207, this court says: "The question was for the jury to determine, from all the facts and circumstances adduced in evidence . . . And it was for the jury to test the credibility of the defendant as a witness . . . . uninfluenced by instructions which might operate to strip him of the competency accorded by law. We repeat what was said by Mr. Justice Shiras, for the court, in Hicks vs. U. S., 150 U. S., 452. . . . . 'And perhaps a judge cannot be considered as going out of his province in giving similar caution as to the testimony of the accused . . . . if the judge, to whose lightest word the jury properly enough give great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability . . . . . The policy of this enactment should not be defeated by hostile intimations of the trial judge, whose duty it is to give reasonable effect and force to the law.

"While the trial judge may not have intended to be understood that the defendant could not prove his defense by his own testimony, and had it in his mind simply to warn the jury that they should not rely on the defendant's opinion that his conduct was justifiable, but on the facts, or what reasonably appeared to him to be such, we think these remarks had a much wider scope, and must have been so understood by the jury . . . . . and it was

for the jury to say from the evidence what were the facts. And if the jury regarded the remarks of the court as applicable generally to defendant's testimony then defendant was practically deprived of its benefit, and the statute enabling him to testify was rendered unavailing. In our opinion the liability of the jury to thus understand these observations was so great that their utterance constitutes reversible error. Nor was this error obviated by what, some time after, . . . was said by the trial judge. . . . . If this could be, in any aspect, treated as a modification of the previous assertions of the court, it was too far separated from that connection to permit us to attribute that operation to it, and moreover, it was in itself erroneous. As a witness, a defendant is no more to be visited with condemnation than he is to be clothed with sanctity, simply because he is under accusation, and there is no presumption of law in favor of or against his truthfulness.—P. 210.

"Justice and law demand that so far as reference was made to the evidence, that which was favorable to the accused should not be excluded. His guilt or innocence turned on a narrow hinge, and great caution should have been used not to complicate and confuse the issue. But the charge above quoted ignored the evidence tending to show what defendant's proof was; and invited the jury to contemplate the spectacle, . . . unrelieved by allusion to defensive matter, which threw a different light on the transaction.

"If there were evidence, and as to this the record permits no doubt, tending to establish that defendant, etc., ... then this disquisition of the court was calculated to darken the light cast . . . as defendant claimed them to be, and of this he had just cause to complain, even though there were competent evidence indicating the opposite as frequently intimated by the court—intimations which we fear seriously trenched on that untram-

meled determination of the facts by a jury to which parties accused are entitled.—P. 213.

"The logical inference was this . . . and another and inconsistent inference could not be arbitrarily substituted by the trial court . . . graphic language of the court and . . . speculation as to his mental process was uncalled for . . . . . .

"And it is for the jury and not for the judge, passing upon the weight and effect of the evidence, to determine how this may be. In this case it was essential to the defense that the jury should be clearly and distinctly advised as to the bearing, &c. It is open to criticism, and even extenuating circumstances.

"Such an instruction was not only misleading in itself, but it was erroneous in the present case, for the further reason that it omitted all reference to the conduct of the deceased at the time.

"Where the charge of the trial judge takes the form of animated argument, the liability is great that the propositions of law may become interrupted by digression, and so intermingled with inferences springing from forensic ardor, that the jury are left without proper instructions, their appropriate province of dealing with the facts invaded, and errors intervene which the pursuit of a different course would have avoided. Case reversed and remanded for a new trial."

In Davis v. U. S., 160, U. S., 493, this court (Justice Harlan) say: "No man should be deprived of his life (and we add or liberty) under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged."

In Alberty v. U. S., 162, U. S., 508, this court (Justice Brown) say: "but what the facts were was a question for the jury."

In Allen v. U. S., 157, U. S., 675, this court say: "Instruction erroneous in withdrawing from jury question of fact."

The II. assignment of error that we have just been arguing shows we submit the error committed by the trial court in what he did charge the jury, we now also submit the III. assignment of error showing that he erred in not giving in his charge to the jury what was there requested. We shall not undertake to go over the argument again. As kindred questions, we intended that they be presented and considered together. The argument on the one is equally applicable to the other. They are the counterparts of each other. They show the commitment of affirmative error by the trial court both ways. They show that he erred in the charge that he did give the jury, and that he also equally erred in refusing to give what he was asked to on the same point.

III. ASSIGNMENT OF ERROR.

It is further assigned as error that the court refused to give the special instruction asked by defendant in the following words and figures: "Unless you find from the evidence that defendant was the attorney, agent, or other person engaged in prosecuting the pension claims of Anderson, Haynes and Bloodson, then the court instructs you to find for defendant.

We respectfully submit that this was error, because in such special instruction the jury are required to find what was the fact as to defendant's connection with the procuring or prosecution of Anderson's or Bloodson's claim for pension money.—R., p. 197.

R., p. 181, where the trial court refused to give this charge, you see again what a strange reason he gives for refusing it. He says: "I think I have given this instruction in the general charge, and believing the charge on this point is sufficiently full, further instruction is declined."

He had given this in the general charge. That is he had given it in the general charge to the jury that he had found as fact that the defendant was instrumental in the prosecution of these claims in such sense that if he withheld the money he would be guilty.

"And believing the charge on this point is sufficiently full, further instruction is declined."

There is no question about its being sufficiently full—it is full to overflowing. It is too full, that is the real and true objection to it. The trial court found for the jury and so charged them that as a fact defendant was instrumental in the prosecution of these claims in such sense that if he withheld the money he was guilty. It is that to which we really object.

XIII. ASSIGNMENT OF ERROR.

The verdict of the jury is against the weight of the evidence:

1. The evidence preponderates in favor of the accused.

2. If this be not so, it is not sufficient to overcome the presumption of innocene and establish the guilt of defendant beyond a reasonable doubt.—R., p. 199.

The trial court erred in its charge to the jury on the presumption of innocence.—R., p. 174.

The only element of law in the proposition was not stated.

The error complained of in the charge of the trial court is that he did not tell the jury that the presumption of innocence was evidence for the defendant. That it was the witness created by the law in favor of the accused and stood for him with the other evidence until overturned by proof showing his guilt beyond a reasonable doubt—"legal evidence of guilt, carrying home a degree of conviction short only of absolute certainty." Defendant had the rigt to have the presumption of innocence so

stated and explained and expounded to the jury by the trial court.

In nearly a page of printed matter the trial court fail[illegible] the (R., p. 174) rule of evidence in a criminal and a civil case and reasonable doubt, but we respectfully submit it is not a correct statement of the law in regard to reasonable doubt, and in it, too, we submit the trial court erred. In the Coffin case, page 160, the whole doctrine of reasonable doubt is properly stated.

And nothing better illustrates the error committed upon this question of the presumption of innocence than what the trial court did say in the case at bar when compared with the opinion in the Coffin case.

How much effect can the mere annunciation of the abstract proposition of law of the presumption of innocence have upon a jury unlearned in the law if it is intended that the accused should have the benefit of it. And nothing more aptly illustrates it or more sharply and strongly points it out than the opinion in the Coffin case.

Here in the case at bar we are told that all that is needed is to simply say that the accused is presumed to be innocent to a jury unlearned in the law and the rights of the accused will be fixed thereby without telling the jury that it is the witness created by the law in favor of the accused that with the other evidence must stand for him until overturned by evidence to the contrary showing his guilt beyond a reasonable doubt—"legal evidence of guilt, carrying home a degree of conviction short only of absolute certainty."

In the Coffin case the opinion there shows us that in the very highest court of the greatest nation of the earth, there at the hands of its judges, the most learned in the law and crowned with years of the richest experience, they traced this question back to about the very foundations of the world, and almost through all nations, ages and times—depth of research, deliberation and

investigation—and expounded it so that the man who reads can easily understand it. All this time and labor bestowed on this question by this court of last resort to learn what it is and be sure to state it right. And yet we are told that a jury unlearned in the law will know it all when it is simply fired at them in a passing moment in a few lines with printed pages of many other things as the simple naked legal proposition of the presumption of innocence without a single word of explanation as to what it is or means. This cannot be true.

In Coffin v. U. S., 156 U. S., 458, this court by Mr. Justice White, say: "Now the presumption of innocence is a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, *he must be acquitted* unless he is proved to be guilty. *In other words, this presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created.* This presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, *constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn*"

Greenleaf thus states the doctrine:

"As men do not generally violate the penal code, the law presumes every man innocent; but some men do transgress it, and therefore evidence is received to repel this presumption. This legal presumption of innocence is to be regarded by the jury, in every case, *as matter of evidence, to the benefit of which the party is entitled.*"

Wills says:

"In the investigation and estimate of crimnatory evidence there is an antecedent *prima facie* presumption in favor of the innocence of the party accused, grounded in reason and justice, not less than in humanity, and recognized in the judicial practice of all civilized nations;

which presumption must prevail until it be *destroyed by such an overpowering amount of legal evidence of guilt as is calculated to produce the opposite belief.*" Best declares the presumption of innocence to be a "*presumptio juris.*" The same view is taken in the article in the Criminal Law Magazine for January, 1889, supra. It says:

"This presumption is in the nature of evidence in his favor (i. e., in favor of the accused), and a knowledge of it should be communicated to the jury. Accordingly, it is the duty of the Judge in all jurisdictions, ... , to explain it to the jury in his charge.

"The fact that the presumption of innocence is recognized as a presumption of law and is characterized by the civilians as a *presumptio juris* demonstrates that it is evidence in favor of the accused. For in all systems of law legal presumptions are treated as evidence giving rise to resulting proof to the full extent of their legal efficacy.

"Concluding, then, that the presumption of innocence is evidence in favor of the accused, introduced by the law in his behalf, let us consider what is a 'reasonable doubt.' It is of necessity the condition of the mind produced by the proof resulting from the evidence in the cause. It is the result of the proof, not the proof itself; whereas the presumption of innocence is one of the instruments of proof, going to bring about the proof, from which reasonable doubt arises; thus one is a cause, the other an effect. To say that one is the equivalent of the other is therefore to say that legal evidence can be excluded from the jury, and that such exclusion may be cured by instructing them correctly in regard to the method by which they are required to reach their conclusion upon the proof actually before them. In other words, that the exclusion of an important element of proof can be justified by correctly instructing as to the proof admitted. The evolution of the principle of the presumption of innocence and its resultant, the doctrine of reasonable doubt,

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makes more apparent the correctness of these views, and indicates the necessity of enforcing the one, in order that the other may continue to exist. Whilst Rome and the Mediævalist taught that wherever doubt existed in a criminal case, acquittal must follow, the expounders of the common law, in their devotion to human liberty and individual rights, traced this doctrine of doubt to its true origin, the presumption of innocence, and rested it upon this enduring basis. The inevitable tendency to obscure the results of the truth, when the truth itself is forgotten or ignored, admonishes that the protection of so vital and fundamental a principle as the presumption of innocence be not denied, when requested, to anyone accused of crime. The importance of the distinction between the two is peculiarly emphasized here, for, after having declined to instruct the jury as to the presumption of innocence, the court said:

"If, after weighing all the proofs and looking only to the proofs, you impartially and honestly entertain the belief," etc. Whether thus confining them to "the proofs," and only to the proofs, would have been error if the jury had been instructed that the presumption of innocence was a part of the legal proof, need not be considered, since it is clear that the failure to instruct them in regard to it excluded from their minds a portion of the proof created by law, and which they were bound to consider. "The proofs and the proofs only" confined them to those matters which were admitted to their consideration by the court, and among these elements of proof the court expressly refused to include the presumption of innocence, to which the accused was entitled, and the benefit whereof both the court and the jury were bound to extend him.

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its inforcement lies at the foundation of the administration of our criminal law. It is

stated as unquestioned in the text books, and has been referred to as a matter of course in the decisions of this court and in the courts of the several states. (Authorities cited).

"Greenleaf traces this presumption to Deuteronomy, and quotes Mascardus De Probationibus to show that it was substantially embodied in the laws of Sparta and Athens. Whether Greenleaf is correct or not in this view, there can be no question that the Roman law was pervaded with the results of this maxim of criminal administration, as the following extracts show:

"Let all accusers understand that they are not to prefer charges unless they can be proven by proper witnesses or by conclusive documents, or by circumstantial evidence which amounts to indubitable proof and is clearer than day.

"The noble (divus) Trajan wrote to Julius Frontonus that no man should be condemned on a criminal charge in his absence, because it was better to let the crime of a guilty person go unpunished than to condemn the innocent.

"In all cases of doubt, the most merciful construction of facts should be preferred.

"In criminal cases the milder construction shall always be preserved.

"In cases of doubt it is no less just than it is safe to adopt the milder construction.

"Ammianus Marcellinus relates an anecdote of the Emperor Julian which illustrates the inforcement of this principle in the Roman law. Numerius, the Governor of Narbonenis, was on trial before the Emperor, and contrary to the usage in criminal cases, the trial was public. Numerius contented himself with denying his guilt, and there was not sufficient proof against him. His adversary, Delphidius, 'a passionate man,' seeing that the failure of the accusation was inevitable, could not restrain himself, and exclaimed, 'Oh, illustrious Cæsar, if it is

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sufficient to deny, what hereafter will become of the guilty?' To which Julian replied, 'If it suffices to accuse, what will become of the innocent?'" The rule thus found in the Roman law was, along with many other fundamental and humane maxims of that system, preserved for mankind by the canon law. Exactly when this presumption was in precise words stated to be a part of the common law is involved in doubt. The writer of an able article in the *North American Review*, January, 1851, tracing the genesis of the principle, says that no express mention of the presumption of innocence can be found in the books of the common law earlier than the date of "McNally's Evidence," 1802. Whether this statement is correct is a matter of no moment, for there can be no doubt that, if the principle had not found formal expression in the common law writers at an earlier date, yet the practice which flowed from it has existed in the common law from the earliest time.

"Fortescue says: "Who, then, in England can be put to death unjustly for any crime? since he is allowed so many pleas and privileges in favor of life; none but his neighbors, men of honest and good repute, against whom he can have no probable cause of exception, can find the person accused guilty. Indeed, one would much rather that twenty guilty persons should escape the punishment of death than that one innocent person should be condemned and suffer capitally."

"Lord Hale (1678) says: "In some cases presumptive evidence goes far to prove a person guilty, though there be no express proof of the fact to be committed by him, but then it must be very warily pressed, for it is better five guilty persons should escape unpunished than one innocent person should die." He further observes: "And thus the reasons stand on both sides, and though these seem to be stronger than the former, yet in a case of this moment it is safest to hold that in practice which hath least doubt and danger, quod dubitas, ne feceris."

"Blackstone (1753–1765) maintains that the law holds that it is better ten guilty persons escape than that one innocent suffer."

"How fully the presumption of innocence had been evolved as a principle and applied at common law is shown in McKinley's case (1817), where Lord Gillies says: "It is impossible to look at it (a treasonable oath which it was alleged that McKinley had taken) without suspecting and thinking it probable it imports an obligation to commit a capital crime. That has been and is my impression. But the presumption in favor of innocence is not to be re-argued by mere suspicion. I am sorry to see, in this information, that the public prosecutor treats this too lightly; he seems to think that the law entertains no such presumption of innocence, and I cannot listen to this. I conceive that this presumption is to be found in every code of law, which has reason, and religion, and humanity for a foundation. It is a maxim which ought to be inscribed in indelible characters in the heart of every judge and juryman; and I was happy to hear from Lord Hermand he is inclined to give full effect to it. To overturn this, there must be legal evidence of guilt, carrying home a degree of conviction short only of absolute certainty."

And this doctrine of presumption of innocence was reiterated by this court in the Davis case supra, by Mr. Justice Harlan.

After failing in the charge as shown to instruct the jury that the presumption of innocence is a part of the legal proof for them to consider in favor of the defendant that must stand for him with the other proof until it is overturned by legal evidence of guilt, carrying home a degree of conviction short only of absolute certainty, and giving, as is seen, the careless, loose, rambling statement about the rule of evidene in a civil and criminal case and reasonable doubt, then the trial court starts on in the charge (R., p. 174) to disparage the defendant as a wit-

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ness to the jury. He says: "Now, the defendant is permitted to testify in his own behalf."

Just allowed to testify, that is all—he says in substance. And by what he says next how completely he destroys the defendante as a witness.

"And the fact of his motive or interest to escape punishment no longer disqualifies him as a witness."

"He is a competent witness, and it becomes your duty to accept him as competent."

"And it becomes your duty." What an intimation! Not your privilege but your duty. However painful a duty it may be, it is your duty, and you must accept him. I know you don't want to do so, is the intimation, and I don't want you to; but it is your duty and you have to accept him, and accept him as competent.

And then the court begins to demolish his competency as a witness and emphasizes it by what he says:

"And to duly weigh and consider his testimony, and the motive that he labors under, no longer disqualified him as a witness, goes to his credibility, and is to be considered by you as a circumstance in determining what weight you will give to his testimony given in his own favor. You should consider the fact that he labors under a strong motive to escape conviction and punishment or disgrace by testifying to a state of facts that exculpate him from the charge against him, *and you are at all times to weigh what he says in connection with that circumstance as going to his credibility*, and having done so, you give to his testimony such weight as you may think it entitled to under all the circumstances." R., p. 175.

"If there is a conflict, as I think there is;

"If *the conflict is irreconcilable*,"

It would seem the verdict should have been not guilty.

"If the conflict is irreconcilable," we would surely submit the presumption of innocence was not overturned. Guilt beyond a reasonable doubt was not shown.

"If the court expresses a view, if it does express any,

"Now, there is a direct conflict R. p. 176.

"Now then, in such a conflict

"it would be a strong circumstance against Mr. Humes R., p. 177.

"It is contradictory to what he now states before the jury on the stand, and it is inconsistent with the transaction as he now details it, *and is inconsistent with his innocence, as it is now maintained.*"

"Is it possible for language to emphasize more strongly the trial judge's view in fixing with the jury guilt on defendant? In this single sentence, in this long charge of nearly all the same thing, he repeats it three times. Puts it in three different ways in one sentence to emphasize it.

"It is contradictory to what he now states before the jury on the stand, it is inconsistent with the transaction as he now details it, *and is inconsistent with his innocence, as it is now maintained.*"

"Now, did they understand Finley, and did Finley understand them in that conversation?"

This is just given to show how carelessly in all things this charge was talked of. The defendant, Humes, was meant here But this helps to show that while some times the wrong law is talked of in the charge, so also often the wrong person's name is called when the court is talking of some one else.

See next how he urges it more, and states it in even stronger words if that was possible, in seeming to fix with the jury his view of guilt.

See how he argues and reasons his view of it to the jury in the effort to fix with them that view.

"It is impossible that what he said then could be true, and that what he now says could be true, and it is impossible, in view of the facts now before you, that a statement of that sort could be true and he could be inno-

cent, because if he paid him $50 he don't pretend that he otherwise paid him the pension money, *and it would warrant you in the inference that he witthheld the remainder of it.*"

Here in plain words he tells the jury three times that what defendant testified to could not be true. He tells them three times that it is *impossible that what he testifies to could be true;*

"*it is impossible that what he said could be true*"

"*and that what he now says could be true;*"

"*and it is impossible, in view of the facts now before you, that a statement of that sort could be true and he could be innocent,*"

"because if he paid him $50 he don't pretend that he otherwise paid him the pension money."

And now he is bent in fixing guilt on the defendant in what he says to the jury, and he states it:

"and that would warrant you in the inference that he withheld the remainder of it."

After then he says:

"that is a strong circumstance in this case."

"That is a question for you to say, if you can."

Was a trial judge ever before anywhere heard to tell a jury trying a person for his liberty, "That is a question for you to say, if you can." To throw so much doubt on a fact they were to find as it seems purposely and in effect to tell the jury "if you can." In short, that you can't find how it is.

And if it was involved in so much doubt, such grave doubt, then it was surely the duty of this trial judge to have told this jury that being involved, as he says, in such doubt, therefore it could not overturn the presumption of innocence in favor of the accused.

It did not establish his guilt beyond a reasonable doubt and their verdict should be not guilty.

"Finley," then the trial judge says.

Juryman: "You had reference to Mr. Humes, didn't you? You said Finley."

The court: "Yes, sir."

Even a juryman had to try to keep the judge right about the names of the persons he was speaking of.

Then he says:

"And the subsequent statute, the one under which this pension is issued, prohibits a notary from charging the 50 cents, and requires that he should perform that service for nothing."—R., p. 178.

This just shows how confusedly, to say the least of it, was the trial court informed as to what the different acts really were.

The act of June 27, 1890, does not contain any such provision.

The acts of 1888 and 1889, appropriating the money to pay the pensions of those two years, provide that any United States officer should, without any charge, let persons execute the vouchers under those acts, but not further or otherwise.

But this statement in the charge just shows to what extent this persecution was carried. That was the insistence of the District Attorney in this case to the court and jury, namely, that the defendant should be found guilty under a charge of wrongfully withholding pension money under such statute, whether he was agent, attorney or any other person instrumental in prosecuting these claims for pension before the Pension Office, even if he did nothing except collect the notary 50c fee.

And to show how far such improper matters were pushed, seeking to prejudice the case and the jury against defendant, R., p. 134, shows that other such charges as these had been made in just such a way and grounds; and that the District Attorney, as we submit, wrongfully used this fact to prejudice the jury and the case against the defendant.

Then he says:

"And if what Sanderlin says is true, if Mr. Humes had made the statement to Finley and Laughlin, which they say he did, it would not have been a true statement; so that there is on that point a *hopeless conflict in the evidence—in its terms and its implications*, and you have got that to deal with."—R., p. 178.

"*A hopeless conflict!*" If this be so, the presumption of innocence was not overturned by proof showing guilt beyond a reasonable doubt.

And he adds "in its terms and *implications*."

XI. ASSIGNMENT OF ERROR.

It is nowhere mentioned in the charge that the bank book, with the entry made of the date of the payment of the check, if free from suspicion, would be very strong evidence tending to show that the check was actually paid on October 8, 1894. It is submitted that this important documentary evidence should have been called to the attention of the jury, with proper instructions in regard thereto. R., p. 199.

This assignment is sustained by what is said by this court in the case just cited of Allison: "Justice and the law demand that so far as reference was made to the evidence, that which was favorable to the accused should not be excluded. . . . and great caution should have been used not to complicate and confuse the issue. But the charge ignored . . . the evidence tending to show what defendant's proof was; and invited the jury to contemplate the spectacle unrelieved by allusion to defensive matter, *which threw a different light on the transaction.*"

And there is much more of this well reasoned opinion that we feel sure is just exactly in line with the objections we here make to the charge in the case at bar, and which we refrain from quoting again to avoid needless repetition. But we surely beg its full consideration and application to the case at bar, as being the same errors

committed by the judge in each case, and the rules of law governing being identically the same.

Again, in the Hickory case, where a statement is spoken of in the Starr case in approving the language in the Penn case, this court quotes: "When there is sufficient evidence upon a given point to go to a jury, it is the duty of the judge to submit it calmly and impartially."

And that great care should be exercised that the charge given should not mislead, and *especially that it should not be one-sided.*

"The charge given in this case violates every rule thus announced. It was neither calm nor was it impartial. *It put every deduction which could be drawn against the accused from the proof . . . and omitted or obscured the converse aspect.* In so doing it *deprived the jury of the light requisite to safely use these facts as means to the ascertainment of truth.*" And without further extensive comment we earnestly submit that these authorities demonstrate the correctness of the position taken and that this assignment is well taken and should be sustained.

XII. ASSIGNMENT OF ERROR.

Throughout his charge his honor refers to the serious conflict of evidence, and in one part of the charge refers to the conflict in the most vital part of the contention as hopeless. Such a state of the evidence, it is submitted, should have worked the acquittal of the defendant, assuming the view taken by his honor in his charge to the jury to be correct, and the jury erred, therefore, in not acquitting. R., p. 199.

If the conflict was, as he says, hopeless, then defendant's guilt was not established beyond a reasonable doubt.

The witness of the law the presumption of innocence had not been overturned, and the verdict should have been not guilty.

The I. and IV. assignments of error are presented and argued together.

I.

Error in failing to instruct that if the jury believed from the evidence the check was not paid to Anderson on October 8, but to some other negro, that this would not justify a conviction of the defendant unless the evidence satisfied the jury beyond a reasonable doubt that the money, either directly or indirectly, through the hands of such other negro, reached the defendant, who wrongfully withheld $486.40 thereof, paying to Anderson, October 29, 1894, or some other day after October 8, 1894, only $50, and wrongfully withholding the entire balance. The defendant was entitled to such instruction, applying the law to this particular and important aspect of the case, and especially so in view of the ground assigned as error under the III. head. R., p. 196.

IV.

The following portion of the charge contains error: "The Government's contention is that in fact Humes took that check there on October 8 himself and procured it to be cashed, and that the younger Humes has no recollection of it at all, except such as he has, in the interest of his brother, actually led himself to believe since; and that on October 29, that he kept that money till that time and then paid Anderson $50, Anderson says, and in respect to which he is corroborated by Finley and Laughlin and by the elder Finley, so far as the date his cow was paid for is concerned."

The tendency of this instruction, it is submitted, was to produce the impression on the minds of the jury that there was some evidence in the case showing that the defendant took the check in person to the bank October 8, 1894, and on that day received from the cashier the amount of the check. In support of this view there is not a particle of evidence. Mr. Humes did not go in

person to the bank. The check was paid to Anderson or some other negro. This under the proof is beyond doubt.

Anderson (c) (R., p. 18–37) P. Finley (R., p. 37–46) Laughlin (R., p. 46–50) and A. Finley (R., p. 50–54) are the only witnesses of the Government as to the Anderson matter.

Not one of them pretend to say that the defendant went to the bank himself in person and cashed the Anderson check.

The defendant testified (R., p. 116) he delivered to Anderson his check and had Sanderlin show Anderson to the Mechanics Savings Bank, corner Main and Madison streets.

The defendant testified that he did not present the check of Anderson to be cashed. R., p. 121.

Franklin (c) testified that he saw Anderson on October 8, '94, go out of Mr. Humes' office with his check in his hand, with Sanderlin going to the bank. R., p. 138–44.

Sanderlin (c) testified: "Mr. L. W. Humes give Anderson his check and I went with Anderson and showed him the bank and saw Mr. Young Humes pay Anderson the money on his check. I identified him at the bank." R., p. 152–153, 157.

W. Y. C. Humes testified: "I as cashier of the Mechanics Savings Bank, and as the bank books show, on October 8, '94, paid William Anderson, colored, the money on his check. Sanderlin was with him. R., p. 160–1–2.

"I did not pay this check to a white man.

"I did not pay it to Sanderlin.

"I paid it to William Anderson. I saw Anderson in this court room last week and I recognized him as the man *I paid the check to on October 8, '94*. He said his name was William Anderson and Sanderlin identified him. The amount of the check was $536.40. I paid it all to William Anderson, except the cost of exchange.

The check is No. 743,149, dated Knoxville, Tenn., October 3, '94, drawn by D. A. Carpenter, U. S. Pension Agent, to order of William Anderson, on the Assistant Treasurer U. S. at New York. It was endorsed by William Anderson, his mark witnessed by L. W. Humes and G. H. Percell. Entered on bank cash book and collection register and sent to the National City Bank, N. Y.

In Hicks v. U. S., 150, U. S., 452, this court by Mr. Justice Shiras say: "The logical inference was this . . . and another and inconsistent inference could not be arbitrarily substituted" by the trial court.

In the case at bar no inference was substituted which in the Hicks case was said was inconsistent and could not be arbitrarily substituted, but a theory was stated by the trial court upon which there was in the case not a scintilla of proof to base it on, and which was in the very teeth of all the proof on the question in the case.

In disposing of the IV. assignment of error on motion for a new trial the court says: "I think it was proper to direct the minds of the jury to the contention,"

Whether there were any facts in the record to base the contention on or not, as there was not shown by the proof hertofore cited and quoted.

He says further, "I think it was full in this respect."

This is true. It was very full in this respect. Full to overflowing. It stated a contention by the trial judge for the Government upon which there were no facts in the record to base it.

He says: "And fair to the defendant."

Certainly it was fair to the defendant, on the same idea of the man who said equity was a perversion of justice.

VIII. ASSIGNMENT OF ERROR.

In calling attention to the circumstances that might lessen the credit to be given to the witnesses of the defendant, it is submitted that a similar instruction

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should have been given in regard to the testimony of Laughlin and Finley, but, instead of doing so, his honor instructed in regard to them as follows: "Now, you have got that conflict to deal with. What interest did Finley and Laughlin have to testify anything but what they understood to be the truth, and did they correctly understand it?" It is submitted that, inasmuch as relationship and employment are mentioned as circumstances tending to weaken the testimony of defendant's witnesses, the jury should have been instructed that if Laughlin was the counsel of Anderson, and Finley, his landlord and self-constituted protector, undertaking to look after his interests, that this would be a circumstance which might be looked to in weighing their evidence, and especially as immediately after what his honor says in respect to Finley and Laughlin, the jury are told that they may look to the fact that Sanderlin was in the employ, to an extent, at least, of Humes. R., p. 178–9.

Then he says, "That manifest conflict."

The trial court made no comment to the jury on P. Finley's being Anderson's self-constituted protector, or Laughlin his paid attorney; or that P. and A. Finley were father and son.

Everything as shown in the charge was said by the trial court to discredit defendant's witnesses. And everything to sustain those of the Government.

The trial court discredited the defendant in his charge to the jury in every way that words would do so in intimations and insinuations.

Discredited Franklin and Sanderlin because they were in the employ of the defendant.

Discrediting W. Y. C. Humes because he was defendant's brother. And L. C. Humes because he was his son. Although the District Attorney did not ask L. C. Humes a word on cross-examination.

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V. ASSIGNMENT OF ERROR.

It is respectfully submitted that defendant's case may have been prejudiced by the following instruction: "Among other things, you may consider for what it is worth, the fact, as the case comes to you, that Mr. Humes, so far as it is developed, was doing or attempting to do this work for nothing but the notary's fee, as a question affecting his testimony." It is true, after the jury had been considering of their verdict for some time, his honor withdrew this instruction, and his purpose was to do so in such a way as would leave no effect whatever upon the minds of the jury. This is always difficult, but almost impossible in this case, where the charge is in substance the fraudulent withholding of the money of the pensioner, and the circumstances referred to tend to disparage the business and stain the reputation of the defendant. The tendency was to lower and depreciate. Withdrawing, no matter how fully done, it is submitted, could not remove the effect already produced.

And this serves, it may be better than anything else in the record, to show how deep-seated was the prejudice on this trial against the defendant, that it almost, if not quite, spread itself to the trial judge. Here is where he admits he made an error against the defendant. And how strange an error it is, too. Because he had found for the jury that the defendant was instrumental in prosecuting these claims for pension in such sense that he was guilty if he withheld any part of the money and was within the provisions of the statutes.

The defendant's contention all along had been that he never was agent, attorney, or any other person instrumental in prosecuting these claims for pension before the Pension Office, but that all he ever had done, and the only and sole connection that he ever had had with these pensioners or their claims, was that in his purely official and ministerial capacity as United States Com-

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missioner he had administered to them the oaths to the vouchers, and so certified under his official seal, and had never received one cent from them except the usual notary's fee—50 cents for each paper.

Now, considering that this is made out by the proof to the satisfaction of the jury, the trial court charges the jury that Mr. Humes, so far as it is developed, was doing this work for nothing but the notary's fee, as a question affecting his testimony.

In other words, if the defendant had made out to the satisfaction of the jury his theory of this case, namely, that he was only acting in any manner connected with these pensioners or their claims in his official capacity as United States Commissioner, and got nothing for it but the usual notary's fee—50 cents; then the trial court charges the jury that they must consider this as a question affecting his testimony.

In other words, if he has made out his case upon this line of defense, they must take this fact to discredit the truthfulness of his statement by. If he was not guilty, because the trial judge told them that as a fact he was instrumental in prosecuting these claims for pension before the Pension Office of these parties, and if he has satisfied the jury that he only acted as notary in swearing them to their papers and so certifying under his official seal and only got the notary's fee, then this charge tells them he is guilty anyhow, and you find him so, whether he is under the statute under which he is indicted or not, because if he has proven a perfect defense you must discredit him by that.

If he has made out his case—made out a perfect defense—proved to your entire satisfaction *his innocence of this charge and that he is not guilty*, then I charge you, says this trial court, that you must take that as discrediting his statement.

In the history of the world did you ever hear it said before that if a man made out a perfect defense to a

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charge, that a jury must take that making out of a perfect defense by the accused to discredit him by?

In short, don't believe him anyway, or anything he says.

If he has told the truth, don't believe him anyway, discredit him for and by his telling the truth.

In disposing of the V. assignment of error, on motion for a new trial by the trial court, of course the trial court did not think it was error to have left the instruction as given, as he says. To discredit the defendant because he had proven the truth of his contention on this point, why, of course, the trial court did not think this was error.

It was withdrawn, so it could not have possibly hurt the defendant—the trial court says (R., p. 15). It was not its withdrawal that hurt, it was giving it in charge. That is the error well complained of.

IX. ASSIGNMENT OF ERROR.

The tendency of the following, which was repeated in the instruction in regard to Bloodson whether so intended or not, probably injured the plaintiff in error's case in the estimation of the jury, viz: "Another circumstance is, if Humes started out to swindle Anderson out of his pension, you may consider the fact that according to what Andersan says, out of $536.40 Humes took all of it except $50. It is not a case where he undertook to take some of it—a small part—but he took all of it except $50."—R., p. 199.

"So that, as the case is testified to by these old colored men, Mr. Humes took all of Anderson's money except $50—took out of $536.40—and of Bloodson's $567.20, took all that but $50, and took half of Haynes'."—R., p. 180.

"If Humes started out to swindle Anderson," the trial court tells the jury in the charge. And then repeats it as to all three.

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To tell a trial jury that if a man started out to swindle another or three other men, the trial court says, in disposing on motion for a new trial of this objection to his charge, that it was intended to be for the benefit of the plaintiff in error.

Telling a trial jury that a man started out to swindle three other men was intended to be of benefit to the man that was doing the swindling is strange beyond comprehension.

The trial judge told the jury that if the plaintiff in error started out to swindle Anderson and out of $536.40, Humes took all of it except $50, and of Bloodson's $567.20, took all of that but $50, and took half of Haynes', and then we are told this was intended for the benefit of the plaintiff in error. If this was for the benefit of the plaintiff in error we wish we knew what the trial court thought he could say that would be of detriment to the plaintiff in error.

This objection, the trial court says, covers a portion of the charge distinctly intended to be in the interest of the plaintiff in error.

How such words, as if Humes started out to swindle Anderson he took all of Anderson's except $50 out of $536.40, it is not a case where he undertook to take some of it, a small part, but he took all of it except $50, and of Bloodson's $567.20 took all of that but $50, and took half of Haynes's; how such words as these could be in the interest of plaintiff in error we are unable to see.

The trial court says further:

The fact that an intelligent man as the plaintiff in error is undertaking to cheat these ignorant old pensioners, would have been so bold and defiant as to have taken and appropriated to himself not merely a part, but almost the whole of all that was coming to them, was a circumstance that rendered the transaction somewhat unreasonable."

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We agree to this, that the facts here stated rendered the transaction most unreasonable.

And we surely submit that this being so, it was the duty of the trial court, in simple justice to the plaintiff in error, to have, in some words from which some such idea, intimation or inference could have been drawn, said so in charge to the jury.

And it is surely reversable error to, in words, call plaintiff in error, in the charge to the jury, a swindler, and say he started out to swindle three men and took all each had, of the two of them over $500, except $50 each, and half of the other's. To denounce defendant as a swindler to the jury trying him.

The trial judge says further:

"And the attention of the jury was directed to this as a circumstance in plaintiff in error's favor, and to that extent against the reasonableness of the testimony of the pensioners."

But how calling a man on trial accused of a crime a swindler, and saying that he started out to swindle three men and took all of the money of two of them—over $500, except $50 from each, and half from the other, can be said to be directing the attention of the jury to it as a circumstance in plaintiff in error's favor, and to that extent against the reasonableness of the testimony of the pensioners, is beyond our comprehension.

That such a meaning could be wrung from the words of the charge we submit is impossible. No such meaning could ever have been dreamed or thought of, or interpretation could have been given, the words of this charge, unless the trial court had have said that was what he meant. And if this was his meaning he surely never said what he meant or meant what he said.

And we feel sure what he did say misled the jury; never gave them any idea such as he says he meant in his overruling this objection on the motion for the new trial.

He says further:

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"As the instruction does not misstate the facts and *suggests no inference from it*, except such as would be in plaintiff in error's favor, as it was designed to be." R., p. 16.

What a strange idea this is, that no inference was in the charge that called a man a swindler to a jury, and to say that he started out to swindle three men and took all their money—over $500, from each of two of them; all except $50 from each of two of them, and half of the other's—not a case where he undertook to take some—a small part—but he took all, except $50 from two and half from the other—that to say this in a charge to a jury trying a man for his liberty suggests no inference except such as would be in his favor, as it was designed to be, we can but say is past our understanding or finding out.

If the trial court had have given in his charge to the jury the explanation of it which he does in what he says in disposing of it as an objection to the charge on motion for a new trial, it would have made it a very different thing.

Indeed, we submit that what he there says is a confession or admission that what he said to the jury was error.

There is just the same difference between the two that there is between the Egyptian darkness of midnight and the broad sunlight of mid day.

And so, even in disposing of the motion for a new trial, you still find this trial judge using on one hand words of condemnation of plaintiff in error "undertaking to cheat," and on the other word of sympathy, "these ignorant old pensioners."

He says, "and to that extent against the reasonableness of the testimony of the pensioners."

The charge is here for this court to inspect and if in its ten long, closely printed pages there is one letter, one word, one single intimation, inference or insinuation "to

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that extent against the reasonableness of the testimony of the pensioners" we fail to find it.

On the other hand from the beginning to the end you find everything as was in this item of the charge that could be thought of, said, done, intimated, insinuated and inferred against plaintiff in error, his case and witnesses, and everything for these people against him.

VI ASSIGNMENT OF ERROR.

The tendency of the following instruction, it is submitted, was to prejudice the cause of the plaintiff in error: "Now, I have undertaken, somewhat tediously, to direct your attention to this conflict over the Anderson transaction, because most of the proof in the case is in regard to that, and *the most extensive conflict* is in regard to that and the testimony on behalf of the Government, particularly in corroboration of Finley and Laughlin, makes the case against Humes in regard to that transaction stronger than it is in regard to the other," in this particular part of the instruction, which was calculated to give undue prominence to the testimony of Finley and Laughlin. R. p. 198.

Then the trial judge says,

"And if you should convict the plaintiff in error Humes, on the Anderson transaction—"

And the irresistible inference, intimation and insinuation as conveyed to the jury by these words of the trial court is, that you will,

"It would not necessarily follow,"—he says.

The intimation is strong that it would follow in these words, but the trial judge is condescending enough to say,

"*It would not necessarily follow* that you would convict him on the third and seventh counts in regard to Bloodson and Haynes transactions."

The very strongest intimation in these words *is that it would most likely* follow, but the trial judge condescends

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sufficiently to say "*it wouldn't necessarily do so*"; not *ex necesitati*.

"Nothing would follow one way nor the other about that, because the fact that a man is guilty of a crime in respect to one transaction,"

And words could not make the inference and intimation of the trial judge stronger that the plaintiff in error was,

"Is not a ground on which you would convict him on another."

It might in all probability be, is the strong intimation and import of the words; but it would not be absolutely so, he says in effect.

The trial court then gives the final clause to his charge, as if to seal, as he did with the jury, the doom of the plaintiff in error. No stone was left unturned to fix his fate with the jury and to prejudice it all that could be done against him, and then the trial court says, (R., p. 181):

"Now, this pension law, under which the plaintiff in error is indicted, is a provision intended to protect. It is a new phase of the old problem in legislation of protecting the weak against the strong, and was designed, among other things, *to protect ignorant pensioners against all impositions* by men who undertake to be instrumental in the prosecution of their claim and then withheld from them what was due to them *and converted it to their use.* He says this pension law, under which the plaintiff in error is indicted, is a provision intended to protect.

A new phase of the old problem in legislation of protecting the weak—these pension people, is the plain import of these words—*against the strong—this plaintiff in error, is the intimation of those words, too clear to be mistaken.*

But if these words have not made the imputation and insinuation of wrong by plaintiff in error towards these pensioners plain enough, then the trial court has

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fixed in what he next says too plain for there to be any longer or further doubt or mistake about it.

And he says—"*designed to protect ignorant pensioners.*"

He has told the jury before that as a fact plaintiff in error was instrumental in prosecuting these claims for pension before the Pension Office.

And now he says, "designed *to protect ignorant pensioners against all impositions by,*"

The weak, he said; and now he says *ignorant, helpless, to-be-pitied and feel-sorry-for pensioners,* was the idea conveyed, and intended to be conveyed, to the jury, on the one hand *in favor of these pensioners* and *on the other against the plaintiff in error.*

"*All impositions by*"—every word and phrase that could be thought of *to cast imputations and insinuations upon plaintiff in error was used as shown all through the charge by this trial court.*

"*Designed among other things*"—we are surprised that the trial court put this expression in so mild a form; among other things—his usual way of stating it would have been "designed for the sole purpose."

"*Designed to protect ignorant pensioners against all impositions*" *by men like this plaintiff in error is the undoubted insinuation and imputation, who undertake to be instrumental in the prosecution of these claims, as he had charged before to the jury the plaintiff in error was, and withheld—in fact "withheld from them what was due to them and converted it to their use as the plaintiff in error has in fact withheld and converted to his own use these moneys from these people in this case," is the irresistable import of these words of the charge to the jury by this trial court.*

VII. ASSIGNMENT OF ERROR.

It is respectfully submitted that his honor may have misled, and probably did mislead, the jury in the emphasis which he laid upon the testimony of Finley and Laughlin and in what he said in regard thereto, and

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which was repeated three several times. This, taken in connection with what was said in regard to the same testimony at the close of his honor's review of the testimony, tended to give the testimony of Finley and Laughlin undue prominence. R., p. 198.

In disposing of the sixth and seventh assignment of errors, the trial court on motion for new trial says, No. That undue prominence was given in isolated sentences or clauses because it was not in them all was the trial court's idea of doing no harm to plaintiff in error in the charge to the jury.

Because the trial court, in commenting on the testimony, gives undue prominence to the evidence of the Government, without summing up all the testimony, as well for as against the plaintiff in error.

Because the court, a second time in the charge, in going over the facts against defendant gives undue prominence to those facts, and gives them in a way that have the effect of an argument against defendant, and are not a proper full summing up of the facts.

Because the court bears upon and gives undue prominence to the facts against defendant. These three statements of this error are taken from and in the words in the Hicks case *supra*, and are the same in the case at bar, we submit. As also the Allison case. Both cited before, under assignment herein No. II. and settle we submit this question as well.

After finding for the jury the primary question of fact and so charging them and all through his long ten-page printed charge, giving undue prominence to the evidence against defendant and speaking in the most derogatory terms and slighting way he could think of, of defendant and all his witnesses, and saying everything he could think of in the most favorable way of all the witnesses of the Government, and in effect charging the jury to find defendant guilty, it is not to be wondered at that they so reported on two counts out of nine.

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X. ASSIGNMENT.

The following portion of the charge contains error, viz.: "*Now, of course, it is a minor matter*, but in considering this testimony you can take into account also the intelligence of the witnesses and their reliability as a medium for correctly understanding and correctly communicating facts so known to such witness." The error consists in stating *that the intelligence of the witnesses and their reliability is a minor matter.* R., p. 199.

In disposing of this on the motion for a new trial the court says: "This objection to the charge is again to a part of the instructions in the interest of defendant. It is not to be doubted that the jury properly understood that the court meant for them in considering the testimony of the pensioners who were witnesses to *look to the fact that they were ignorant*, and that their powers to correctly understand or communicate facts was somewhat limited, and *that this was a minor matter was hardly to be doubted.* R., p. 16.

The court says what he stated in the charge was intended for the benefit of defendant. And we submit that what he does say in disposing of the objection to it, just the opposite effect would be produced upon the mind of any person from what the words of the charge produced.

Just the directly opposite meaning is expressed in the two statements.

How any one can think they mean the same we fail to see.

How the words of the charge could be intended for the benefit of defendant is beyond our comprehension. To say the intelligence and reliability of witnesses who were seeking to swear away the liberty of a man *was a minor matter*, and that such words were intended for the

benefit of the person whose liberty was thus undertaken to be sworn away by these people, is just beyond our comprehension.

He says it is not to be doubted that the jury properly understood that the court meant for them, in considering testimony of pensioners who were witnesses, to look to the fact that they were ignorant, and that their powers to correctly understand or communicate facts was somewhat limited. How any one could understand from the words of the charge that the court *meant for them to look to the fact of the ignorance of the pensioner witnesses*, and that their powers to correctly understand or communicate facts was somewhat limited, we can't see.

But if such a meaning could be wrung from the words, he destroyed it by starting out with saying, "*Now, of course, it is a minor matter.*"

He still holds to it, "and *that this was a minor matter was hardly to be doubted.*"

This is not correct rule of law at all. Intelligence and reliability are not minor matters at all. They are the very first requisites and essentials of a witness. Is he intelligent? Is he reliable? If so, it gives great weight to his evidence. It is no *of course minor matter at all*. It is matter of very greatest importance. And the court erred in stating the rule of law in any such way as he did.

If they are densely ignorant, and their powers to correctly understand and communicate facts is somewhat limited, then that should properly go to the weight and credibility to be given their evidence.

If they are so densely ignorant that they don't know their ages; don't know the streets of the city; could not count; don't know one paper from another; don't know when they swear to vouchers; don't know when he made his mark to his checks.

It looks like reason and common justice would dictate that this, in some degree, *and in a very great degree*,

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would go to their weight and the credibility to be given their evidence.

And this court keeps on injecting strange reasons for what he says, "because the facts about which they were testifying were of easy comprehension."

If the facts about which they were testifying were of easy comprehension, so much the worse for the person who could not even understand those simple facts.

Usually a child eight or ten years old knows the names of the streets of the city he lives in. This is common experience. Here these men had lived there over thirty years and did not know the name of a single street in the city. Usually a child of eight or ten years of age can count money. Here these men, past sixty, couldn't. Couldn't tell the days of the weeks, or months, or years, or dates. Say they couldn't keep count of the most recent days and dates of the very daily occurrences. Can't read or write.

And can it be possible that we are told in a court of justice, to a jury, that they must put a premium upon the ignorance and want of reliability of witnesses; and that this is a true rule of law?

The court then ends his answer to this objection by saying "their liability to be mistaken or misunderstand the facts was very slight."

Now, of course, it is a minor matter—the intelligence and reliability of witnesses, he said—in short, their great lack of intelligence and reliability is a minor matter, but he feels that he has not said enough to fully satisfy every person about this, and so he adds that while this great lack of intelligence and reliability *is of course a minor matter*, yet their liability to be mistaken or misunderstand the facts was very slight. In short, these witnesses are very ignorant and not reliable, and *he tells the jury, "but of course this is a minor matter."*

And now, to make sure of it, he says while it is true that they are *densely ignorant and not reliable, their liabil-*

ity to be mistaken or misunderstand is very slight. They are very ignorant and not reliable, can't read or write, don't know the names of the streets of the city where they have lived over thirty years. Swore they could count money, and couldn't when it was handed to them on the witness stand before this jury. But then, after all this, he says their liability to be mistaken or misunderstand was very slight.

If a man was born dumb, and stone blind in both eyes and deaf as a post in both ears, could his liability be any greater to be mistaken or misunderstand than these witnesses show they were in all things, and however, very slight?

The next item in the charge to which we invite the court's attention, is another place where the court seemed to feel that it was necessary for him to enter upon another argument for the protection and benefit of the witnesses for the prosecution. That he has said their intelligence and reliability was of course a minor matter was not sufficient; he must add some more, so that the jury will be governed by it.

We may say that hardly a single one of these witnesses agreed as to the date, day or month in a single statement they make.

In the Anderson matter we may say not a one. For after all this long talk that you see in the charge about the corroboration of Finley and Laughlin, when you turn to Laughlin's evidence you will see he swears he don't know the date, day, week or month. And yet you will find this charge full to over-flowing of the oft repeated statements of the corroboration of Finley and Laughlin. It is the truth you find it in the charge. You hear the court call it time and time again, all through his charge, the corroboration of Finley and Laughlin. But it is no where else in the record, except in the charge. The truth is, just exactly the opposite are the facts as shown in the record and sworn to by Laughlin. You

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still have his unqualified statement that he did not know the date, day, week or month.

This, just like all the rest of it in this record, is just a mountain made out of a mole-hill, without any foundadation in fact or law by the court in the charge. Strange misconception that is simply beyond our comprehension.

And so, when you look to the evidence of all these government witnesses, spoken of again in this brief beyond more fully in detail, you will find they never agreed as to a single date and knew nothing of the dates at all, and contradicted themselves and each other as to them all.

The court saw this, and saw the inevitable result that would naturally have followed in the usual course of things would have been that it would surely have worked the acquittal of defendant, and it must be explained to the jury so they will be right about it, according to his view. He must give the best excuse for it he can think of, and here is his explanation :

"Discrepancies between witnesses as to time, growing out of the frailty of human memory, is ordinarily not a circumstance that affects the testimony of or discredits a witness. It is too common an experience that memory fails as to dates, time and distance, and it is only when the jury believe that a date has been deliberately fixed upon and adhered to with a view to pervert the fact that that would be a circumstance that discredited a witness' testimony." R., p. 175.

" Discrepancies between witnesses as to time."

Oh ! why. The court says in fact there are discrepancies between witnesses.

Now, he must excuse them, "growing out of frailty of human memory," he tells the jury in his charge.

On one hand you have witnesses for defense. And all of them but one can read and write. They are all intelligent, educated persons. The one that can't read or write is far above the average in intelligence ; knows all streets, can count, knows one paper from another, knows

a voucher, a pension certificate and a check ; knows when he makes his mark and swears to a voucher, or puts his mark on a check ; knows dates, days, weeks, months and years.

All of defendant's witnesses are only testifying to dates and amounts fixed by written vouchers, checks and bank books. *No frailty of human memory in this.*

Now, how strange must have been, and how strongly must such contrast strike the unbiased and intelligent mind of any man.

On one hand, for the prosecution you find illiterate, uneducated persons, who can't read or write ; can't count, don't know dates, days, weeks, months or years ; contradict themselves and each other on every statement ; don't know one paper from another ; deny their own sworn statements to the vouchers under seal of officer ; have no written statements showing any date or amount they claim. Finley, of course, swore to a date, but, as pointed out beyond in his evidence, he contradicts himself flatly even as to this, although as we submit it was shown it was a made up story. And Laughlin did not corroborate Finley. Laughlin swears he don't know date, day, week or month. Laughlin not only does not corroborate Finley, but, as shown beyond, on several vital points Laughlin flatly contradicts Finley.

On the other hand, defendant and his witnesses were intelligent and well educated, and were testifying only to written dates and amounts as shown by vouchers, checks and bank books.

With such a contrast as this between the kind of witnesses for the prosecution and defense to deal with and get rid of—get out of the way—are you at all surprised that the court who took the view and bent of a conviction would, in explanation, excuse and to wipe this away say that the *intelligence and reliability of witnesses was of course a minor matter ?* It was bound to have been a minor matter of course, and to be considered by the

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court and the jury in a case like this to get—to secure—a verdict of guilty.

"Discrepancies between witnesses growing out of the frailty of human memory," he says in excuse for the witnesses of the prosecution.

Why did he not tell this jury that the discrepancies between these witnesses for the prosecution growing out of other things than the frailty of human memory should be considered by the jury?

Why did he not tell this jury to properly make such a contrast also, on the other hand that as to defendant and his witnesses there were no discrepancies in their testimony. *That no frailty of human memory entered their evidence. That they testified only by and from the written dates and amounts as shown by the records and the writing thereon of their own signatures?*

The court truly says it was from the frailty of human memory from which the witnesses of the prosecution were testifying.

There was no frailty of human memory in it from which the witnesses of the defense were testifying. They were testifying by and from the solemn written records themselves. These written evidences of the dates and amounts fixed at the taking place of the transactions could not be changed, could not be made to speak anything else but the truth.

"Discrepancies growing out of frailty of human memory."

Is it possible that such things as these can overturn the witness of the law in favor of the accused—the presumption of innocence; overturn it beyond a reasonable doubt; carry home such a degree of conviction as is short only of absolute certainty? Do discrepancies growing out of the frailty of human memory overturn proof—written evidences of the facts, not from the frailty of human memory at all, but solemn written unquestioned evidences of the facts?

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To say such as this would have been fair. This would have been just to both sides. This would have kept the charge from being one-sided. From part of what was in favor of defendant being *omitted or obscured.*

"It is not ordinarily circumstance that affects testimony or discredits a witness," he says.

How guarded the court is in trying to protect these prosecuting witnesses. Ordinarily he says it is not. And then he calls it, in the very slightest term he possibly can find, "a circumstance." Not a fact, as it really was, but only "a circumstance."

Why did he not frankly and openly tell the jury that ordinarily it was a fact that did affect the testimony of and discredit a witness as it does? This is the true rule of the law of evidence.

"*There are discrepancies between these witnesses as to time, but it don't affect the testimony or discredit a witness,*" he says.

But he must state the excuse a little more strongly, and so he says, "it is too common an experience that memory fails as to dates, time and distance." And now, having offered every excuse he could think of in favor of these pensioners and their witnesses, he winds it up "and it is only when the jury believe that a date has been deliberately fixed upon and adhered to with a view to pervert the fact that that would be a circumstance to discredit a witness' testimony."

How could the jury believe, in the face of all the court had said in this long charge, and on every occasion and opportunity, for the protection and benefit of these witnesses for the prosecution, that a date had been deliberately fixed and adhered to with a view to pervert the fact and would be a circumstance to discredit a witness?

Indeed, does not the court here say to the jury in the plainest possible words, "I tell you the discrepancies between these witnesses as to time grow out of the frailty of human memory, and is not only not a fact but not even a

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circumstance that affects the testimony of or discredits these witnesses! It is too common an experience that memory fails as to dates, time and distance, and I tell you the jury must not believe that a date has been deliberately fixed upon or adhered to with a view to pervert the fact, and that is not a circumstance that discredits these witnesses' testimony."

Here for often many, many times he passed again upon the weight, strength and credibility of the evidence. He usurped province of jury and found for them facts, and so fixed it in his charge that they could not have found them otherwise than he stated them.

On the other hand you will find that there could be no discrepancies between the witnesses for the defense. They testified only as to the dates written and fixed on the vouchers sworn to by these pensioners, and certified to under an officer's seal and witnessed by said witnesses, and the checks as to the written dates and amounts shown on them by the bank books showing amounts and dates of payment.

In this one-sided charge does the court say anything to the jury about these records; written facts in favor of defendant and his witness? Oh, no. All in his favor is left out of the charge. All to disparage him and his witnesses is said that could be thought of by the court. But, oh, no! anything in his favor is left out, omitted or obscured in this one-sided charge.

At the bottom of the page (R., p. 16) is found the first observation, as he calls it, of the court on the facts in disposing of the motion for a new trial. And we respectfully submit that the complete answer to it and the objection to it is, what has been so often said about so many of the things in the charge of the court in this case, and that is, that it has as its basis not a single fact as shown in the record.

And further, it is that defendant was tried and convicted on things that were not proved as facts as shown

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in the record, but upon outside observations that he had no opportunity to meet or controvert.

As to the second observation, the facts in the record, undisputed facts by both the witnesses of the prosecution and the defense, show that the conversation between Finley, Laughlin and defendant was a hurried casual conversation of a few moments, standing; as Laughlin, the prosecution's witness says, he called Humes from the front room into the back; that Humes was in the front room, in the press of much business with many other people; that none of the details of the matter were inquired into; that nothing was said about any check, or that that was all that was due Anderson, but that he (Laughlin) asked Humes a few questions about the matter; that after a few moments' hurried talk they left. And if this was not a proper explanation it would be hard to think what would be. If he would not believe this, when it was told to him by all the witnesses both for the prosecution and the defense, what could be said that would be believed? Taking our illustration or answer from the Sacred Book, if they would not believe this they would not believe though one rose from the dead.

The court's whole charge was an argument against defendant, and the jury so construed it and actedupon it.

As another strong fact in this case, showing defendant's contention was true, and that his conviction was had by the jury on the charge of the court, and not on the facts in the record, take the Haynes charge where the verdict was not guilty.

Haynes swore about the same as Anderson and Bloodson. His three so-called corroborating witnesses swore about the same and contradicted themselves and each other about the same. Harris, that cashier,

Defendant testified in substance the same as to all three—Haynes, Bloodson and Anderson.

Franklin testified the same as to all three—Haynes, Anderson and Bloodson.

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swore he might have paid the money of Haynes to defendant.

Indeed, defendant stated he personally went to that bank with Haynes and identified him.

In Anderson and Bloodson's claims it was proved by four or five other witnesses that defendant did not go with them to that bank, and that Anderson and Bloodson did go with another; and that cashier swore he paid Anderson and Bloodson; that he knew them both, and remembered it, and knew he paid them. Sanderlin swears that he went with them to that bank and saw them paid.

In fact the proof in Haynes' claim was stronger against defendant than it was in Anderson and Bloodson's.

And defendant's proof in Haynes claim was not as strong as it was in Anderson and Bloodson's.

But the comments in the charge by the court on Anderson and Bloodson was about ten printed pages, and on Haynes it was about seven lines out of that ten pages.

The proof in all, both for and against, was about same.

And if defendant was innocent in one he was innocent in all.

And if guilty in one he was guilty in all.

Haynes, Anderson and Bloodson and their witnesses swore about the same.

Defendant and his witnesses testified to the same in all.

The jury found that defendant and his witnesses' statements about the Haynes matter was the truth.

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And it is impossible to see how the jury found that the same statements by the same witnesses, defendant and his witnesses, as to Anderson and Bloodson, was not the truth also, except they did so according to the comments of the charge.

On the face of this record it is submitted to the court that defendant was not tried upon the proper position, that he was presumed to be innocent until the proof—first, the presumption of innocence—the witness of the law—in favor of the accused, together with any other proof he may introduce, and the proof against him should establish his guilt beyond a reasonable doubt—carry home conviction short only of absolute certainty; but the theory upon which he was tried, and the conviction had, was that he was guilty, and presumed to be so until he could prove his innocence even in the face of such a charge by the court against him.

Take the vouchers in the case at bar. Here is substantially a copy of them:

"Be it known that I, ——, do solemnly swear that I am the identical person named in pension certificate, in my possession, No. ——, dated ——, and whose name is inscribed on the rolls of the Knoxville agency, at the rate of $—— a month; that I have not been employed or paid in the army, navy or marine service of the United States from —— to the present time, and that my present post office address is ——." Signed by mark.

Witnesses as to mark.

"Subscribed and sworn to before me this —— day of ——, and I certify that the pensioner above named has this day exhibited to me his pension certificate, above described, and was fully identified as the pensioner named therein, and that he signed the following duplicate receipts in my presence."

This is signed by the officer administrating the oath in his official character, United States Commissioner, in

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the cases at bar, and sealed with his official seal. And the duplicate receipts were signed in the presence of the officer and witnessed by some other person. In Anderson and Bloodson's cases their marks were witnessed by Franklin.

Here Bloodson was allowed, upon his simple say so, to deny the oath he there made. And Anderson, so far as he would; but he swore he did execute the voucher to go to Knoxville before he got any money. And in this he agreed with the evidence of the accused and his witnesses.

And if so at all, this was a denial of former statements made by them on oath, in the presence of persons who testified that they saw them sworn to those papers.

To deny the certificate under official seal of the officer that they had so sworn.

Like the return of a sheriff or any other officer, will the littlest thing overturn his official certificate of the fact? We submit not. These vouchers, sworn to under seal of an officer and his certificate, like the return of the sheriff on process, was *prima facie* evidence of the truth of the statements therein contained. And the trial court should have so charged the jury.

And being the statements on oath of Bloodson and Anderson both, in regard to the same matter that they were then testifying in regard to, were in the nature of an estoppel, and worked an estoppel on them to deny it or swear to the contrary.

There is, we submit, an orderly and proper way for the trial court in summing up the evidence to state it. For example, after talking alone about the Anderson claim for over four printed pages then he states to the jury in a few words that he should have said that defendant's witness, Franklin, testified about Anderson matter and corroborated the statements of defendant and all his witnesses.

This is true. Franklin was one of the main wit-

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nesses for defendant. And when the court was summing up at such great length the evidence of the prosecution, and giving such undue prominence to it, and disparaging the evidence of defendant and all his witnesses, he also in the summing up even of what he did say of defendant's evidence, left out altogether all mention of one of his most important witnesses, and then gives it in a few disjointed words wholly disconnected with the Anderson matter and the evidence on the same. R., p. 180.

In the connection in which he gave it he broke the strength and force of it as evidence for defendant. And this was wrong. This was error. Prejudicial error to defendant. And reversable error. Certainly so when taken in connection with the very many other manifest errors as shown by the record, upon which we respectfully submit this case should be reversed and remanded for a new trial.

As before said, there is, we submit, an orderly way of summing up the evidence to the jury by the trial court. If the court was going to sum up the evidence of the Government, it should have taken it up and said here they have

Anderson (c.),
P. Finley,
A. Finley and
Laughlin

on one side, and made such summing up as was proper, and then said: On the other hand you have the evidence for defendant: the witness of the law—the presumption of innocence,

Defendant,
The pension certificates,
Vouchers,
Checks,
Franklin (c.),
Sanderlin (c.),
W. Y. C. Humes,

and the bank records and evidence.

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And made such summing
up as was proper.

Anderson (c) was the main witness for the Government on his claim.

It had also P. Finley, Laughlin and A. Finley, who it was claimed supported Anderson.

Anderson (c.) states he don't know how old he is.

That Humes gave him $50 in money in his office on Oct. 29, '94. That no one was with him —R., p. 28–9

Money in bills was given him, and he could not count it on the witness stand in this case.—R., p. 29. He states he can't tell one paper from another. That he signed a paper like this —R , p. 30. He can't read or write.

He states he signed a paper for the first quarter — R., p. 30

He took the money, he states, to P. Finley, a mile across the city, at the wagon yard.

He denies he went to the Mechanics' Savings Bank, corner Main and Madison streets, Memphis. Denies Sanderlin went with him, or that he knows Sanderlin, although Sanderlin was a soldier during the war with Anderson in the same regiment.

Denies Sanderlin identified him to the cashier of the bank.

Denies that the bank cashier paid him on Oct 8, '94, $536 on that check, or that he ever saw the check —R., p. 30.

He states he signed more than one voucher to draw money on.—R., p. 32.

He says he made out his voucher at Humes's office until after Nov. 4, '95.—R., p. 33.

He took the money, $50 he says, and said nothing to Humes.—R., p. 34.

Although Humes told him he would get $300 or $400.

Humes told him he would get right smart money when he began to draw. R., p. 36.

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P. Finley (R., p. 39) says he did not go to Humes' office with Anderson when he claims to have gotten the $50. R., p. 38.

The prosecution in this case is based for its proof upon what was attempted to be proven by three witnesses as a statement made by defendant to them. To Anderson when he was alone. To the other two when they were together. It is a statement claimed to have been made to them by defendant. And it is undertaken to prove that statement in the nature of an oral admission as having been made to them by the accused in a conversation had with them. We find the law on this point as follows, (Commonwealth v. Knapp, 9 Pick., 507, by Putnam, J.): "In a somewhat extended experience of jury trials *we have been compelled to the conclusion that the most unreliable of all evidence is that of the oral admissions of the party.* . . . . . .

"It is not uncommon for *different witnesses of the same conversation to give precisely opposite accounts of it; and in some instances it will appear that the witness deposes to the statements of one party as coming from the other, and it is not very uncommon to find witnesses of the very best intentions repeating the declarations of the party in his own favor as the fullest admissions of the utter falsity of his claim.*

"*When we reflect upon the inaccuracy of many witnesses, in their original comprehension of a conversation, their extreme liability to mingle subsequent facts and occurrences with the original transactions, and the impossibility of recollecting the precise terms used by the party, or of translating them by exact equivalents, we must conclude there is no substantial reliance upon this class of testimony.*

"The fact, too, that in the final trial of open questions of fact, both sides are largely supported by evidence of this character, in the majority of instances, *must lead all cautious triers of fact greatly to distrust its reliability.*"

Greenleaf on Ev., p. 237, sec. 200 (13th ed.), says:

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"With respect to all verbal admissions it may be observed that *they ought to be received with great caution. The evidence, consisting as it does in the mere repetition of oral statements, is subject to much imperfection and mistake; the party himself either being misunderstood, or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens, also, that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say.*"

P. 118, he says again: "*Very great weight ought not to be attached to evidence of what a party has been supposed to have said; as it frequently happens, not only that the witness has misunderstood what the party said, but that by unintentionally altering a few of the expressions really used, he gives an effect to the statement completely at variance with what the party actually did say.*"

Note p. 238: "It is also well settled that *verbal admissions, hastily and inadvertently made*, without investigation, *are not binding.*" 17 Mass., 27.

P. 251, Sec. 214: "But here, also, as we have before remarked in regard to admissions, *the evidence of verbal confessions is to be received with great caution. For, besides the danger of mistake from the misapprehension of witnesses, misuse of words, the failure of the party to express his own meaning, and the infirmity of memory, &c.*

"*The zeal, too, which so generally prevails, ... and the strong disposition in the persons engaged in the pursuit of evidence, to rely on slight grounds of suspicion, which are exaggerated into sufficient proof, together with the character of the persons necessarily called as witnesses, . . . all tend to impair the value of this kind of evidence.*"

The *most unreliable of all human testimony*, these authorities state the rule of law, is that of an oral admission.

And as the record in this case shows, where it was one of only a few moments' duration in a casual conver-

sation; where the parties stood during it. Where the party sought to be charged was in the very midst of a press of many other business matters with many other persons; and where none of the details were gone into, as all the witnesses say.

Was it deliberately and understandingly made by the party sought to be charged thereby?

It would seem impossible for it to have been done so from the physical facts as shown in this case. It was only a few moments hurried talk, all the witnesses agree. It was while they were standing. None of the details were pretended to have been gone into. And it was while the party sought to be charged was in the midst of a press with much other business with many other persons. It would surely seem that it lacked every single element that would go to make it up one of deliberation and understandingly made.

Was the conversation correctly understood by those who undertook to repeat it? Was it correctly reported?

While it is the most unreliable of all human testimony, and is to be so considered, yet if it was deliberately made by the party making the admission and was correctly understoood and reported by those undertaking to repeat it, then it was competent legal evidence and should have been submited to the jury.

But if it is not deliberately and understandingly made, and correctly understood and reported, then it was not legal evidence and should have been excluded.

Just as hearsay would be.

Well, tested by these rules of law, how was this?

All Anderson says is that Humes said "here is $50 for you."

Not a word does he say Humes told him about a $10 fee.

He states nothing as having been said to him by Humes about the evidence of his pension.

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And it will not be said we submit from his evidence that he fixes the date.

P. Finley says that Humes said Anderson got $60 and Humes kept $10 for his fee as attorney and gave Anderson $50.

He undertakes, we submit, as his evidence shows, by a subterfuge to fix the date of the interview as October 29, 1894. This is all he says.

Laughlin states Humes said he gave Anderson $50 and that $10 was kept back as an attorney's fee, but not Humes'.

Laughlin says he don't know the day, week or month.

He says Humes stated his books would show Anderson was pensioned.

How can three parties be found who say that they heard the same talk, and yet stated it so widely different?

Anderson says it was $50. Both the others say $60.

Not a word does he say about a $10 attorney's fee or evidence of pension.

P. Finley says $60, and Humes $10 attorney fee, and that this was all was said. He says nothing was said of evidence of pension.

Laughlin says $60, and $10 attorney fee, but not Humes'.

He don't know the day, week or month. Humes' books showed Anderson's pension.

Here it is, which one of the three will be taken as the correct statement of the oral admission.

Certainly it has not been correctly understood or reported by either one of them, because they don't agree among themselves as to what was said.

Was it deliberately made by Humes?

Laughlin's evidence shows there was no deliberation about it all and no discussion of the details; a few moments hurried talk when Humes was in the press of other business matters with many other persons.

Anderson was his main witness on his claim. Also P. Finley, Laughlin and A. Finley who it was claimed supported him.

Anderson states defendant paid him $50 at his office in person and in money, and that is all he ever obtained. R., p. 20.

As shown by X. Assignment of Error, the trial court charged the jury that "Now, of course," the intelligence and reliability of the witnesses is a minor matter.

We deny that this is the correct rule of law.

We submit the true rule of law is just exactly the opposite.

But we will undertake to show that this is a very proper way to state the rule to measure this witness by.

The next question is, can Anderson fix the date he claims he got the $50, and does he know how much he got at any time?

Anderson states he knows where defendant's office is here in the city, but don't know as he could go to it. R., p. 19.

Although he went there, as the record shows, for over a year, from September 24, 1894, to after November 5, 1895. This is an ear mark of the intelligence and reliability that the court says is of course a minor matter.

He used to know defendant, he says, (R., p. 18, December 9, 1895) although he'd been having defendant make out his vouchers from September 28, 1894, to after November 5, 1895.

Q. Were you living at the same place you now live last fall—last October? (R., p. 18). Here you see in the very start the month of October is suggested to the witness by the question.

Q. When? (Did Humes give you money?) R., p. 19.

A. 'Long in October.

Q. Of what year?

A. 1894, I think it was, sir.

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Q. How came you to go there to get it? (Humes office).

A. Well, I had been carrying the papers to him and I went to him. When I went to him he told me to be there in a few days and he'd tell me what time to come, and I went there and it wasn't there.

He'd tell me then to wait awhile longer, but he'd send for me; *to keep count of the days and the time I went to him, and I couldn't do it because I couldn't read and write and take account.*

Q. What further did he say; anything about coming back?

A. He said: "Come in a few days." I went there on Saturday; he says: "Come 'bout next week, 'long 'bout *Monday* or Tuesday; some where 'long there." He says: "Come in again; come in every once in awhile. I don't know what time it will be there." And I went there when he told me.

Q. How many times had he gone there with you before you got any money from defendant?

A. He went — well, I couldn't keep count of the times now, I can tell you it was about three times, i

Here is a prosecutor that says Humes told him to keep count of the days and times he went to Humes. And he says: "*I couldn't do it*, because I couldn't read and write and take account." This right there in a very recent date of a few days. And he says he can't do it. And here when he is asked when did Humes give you pension money, and he says: "'Long in October, '94, I think."

"How many times had he gone there?" he is asked, before he got any money from Humes. And he repeats: "*Well, I couldn't keep count of the times.*"

Couldn't keep count of the times—recent days and dates that were then transpiring.

think, before I ever got the money.

Q. How did you come to town that day?

A. Come in *a spring wagon—a buggy.* Went to wagon yard down here on Main street.

Finley didn't go with me from there to Humes office. He staid down there and sent me up to the office to see had my money come.—R, p. 20.

Humes come back with $50 in his hand, and he says: "Here's $50; it's for you. Your mail is come. Here's $50." And he give me the money out of his hand and put it in my pocket and went on down to the wagon yard.—R. p. 20.

No, sir, I didn't go in the other room. I sot there in the chair and I seen him comin' and I got up and met him and he said: "Here's $50 for you." "And he says here's $50 for you" And he say in the next 10 or 15 days come back and it be the quartin' time, that's the drawing.—R, p. 21.

Here is two very materially different statements by this witness in his pretended effort to repeat what was said in answer to the same question asked only a few moments apart.

In one he says, "Here's $50; its for you. Your mail is come. And he give me the money out of his hand and I took it in my hand and put it in my pocket and went on down to the wagon yard."

This is all was said, he says in that answer.

Then he is asked the same question right over again, and he says:

"I didn't go in the other room. I sot in the chair and I seen him comin' and I got up and met him."

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And for fear he'll get the next part of his made-up story wrong, he repeats it twice:

"And he said here's $50 for you. And he says here's $50 for you."

He don't tell us anything about the mail this time. Or his giving him the money out of his hand, and his taking it in his hand, and his putting it in his pocket, and his going down to the wagon yard. No, he has something else to tell this time, and he said, "In the next ten or fifteen days come back and it'd be quart'ing time; that's the drawing."

They are altered statements. They are very materially different statements. And if either, which one of them is the true one—is the correct one—is what was really said? Can anyone tell? We submit not.

And while we are on this point, let's examine side by side the statements of Anderson, P. Finley and Laughlin:

Anderson:	P. Finley:	Laughlin:
"Your mail is come."—R., p. 20.	"His money come in to-day's mail."—R., p. 39.	"That his money had come that morning in the morning's mail."—R., p. 47.

Here are all three of the statements. The words of each one of them are materially altered by each witness. They all can't be true. But if you will take them as all true, which one of them will you say was the words that Humes used?

It just absolutely demonstrates the utter unreliability of such evidence. Anderson says Humes used four words to tell him this, Finley six, and Laughlin eleven. And to further illustrate the truth and force of this position take the charge of the trial court on this point.—R., p. 176. Near the bottom he says, in commenting on these very words of the evidence, "They (P. Finley and Laughlin) say that Humes said 'that the check had come

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that morning'—I am quoting it substantially." "The check had come that morning." Why, neither P. Finley nor Laughlin said a word about check in all that part of their evidence covering pages and pages of printed matter. The word they both used was money. And they never used any other word but money.

So that here in the case at bar you find an unanswerable argument to the unintentional change of a single word altering all the evidence.

Of course the use of the word check in the place of the word money when the trial court was trying to repeat to the jury the evidence of P. Finley and Laughlin was a purely unintentional changing of the words on the part of the trial court, but it just shows how by the change of a single word you may alter all the evidence on a given point.

And it shows another thing; it shows that all persons when speaking of a mode of business that they know of, they are more apt to use the word that really expresses that mode of doing the business than the words that the witnesses really used.

Here the trial court had been shown by the evidence in the record that the way these pension people got their pay was by checks to their order sent by the pension agent through the mail to their addresses. And the trial court thus knowing that this was the way and the only way the business was ever done, and that no money was ever sent, in commenting on the words of P. Finley and Laughlin, used the word check when trying to repeat it for money.

And while we are considering this point we will look at it in another view.

Finley and Laughlin both undertaking to repeat what Humes said to them.

The words and expressions that he used both say he said "his money come." Certainly they were mistaken in saying Humes said money. Humes knew all these

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pensioners were paid by checks to the order of the pensioners sent them through the mail.

And if he should have said to Finley and Laughlin such a thing it would have been a meaningless falsehood, that could have served no purpose to any one. His money could not have come through the mail. No one knew this better than Humes.

And even his check could not have come in to-day's mail or that morning in the morning's mail.

And Humes could not have told Finley and Laughlin such a meaningless falsehood. That could have served him no purpose. He would have been a fool as well as telling a falsehood to have made them such a statement.

For no one better than Humes knew that Anderson's check for $536.40 had been by Anderson cashed at the Mechanics' Savings Bank on Monday, October 8, '94, and the check showed that, and the bank records showed that, and the voucher showed it. And surely Humes could not have been such a fool as to have made a statement that he knew four written records showed was false and could have been so easily shown.

Anderson tries to say Humes said it was $50; Finley and Laughlin both say Humes said it was $60.

Humes could not have told them any such thing, either Anderson that it was $50 or Finley and Laughlin $60.

He did not tell them—his money. They were mistaken about this.

He did not tell them it came that *morning* or *day*. They are mistaken about this.

Laughlin says Humes did not tell them the attorney's fee was his—Humes'.

Finley and Laughlin were mistaken about Humes telling them it was $50. What Humes told them was, that it was nearly or about $550, just as it was. Anderson's check, $536.40, and his attorney's fee, $10, making

his total $546.40, and just as Humes said, nearly or about $550. And like the other mistakes they make in repeating what he said, they have altered it. It is immaterial whether it was intentionally done so, or unintentionally. In repeating or undertaking to repeat what Humes said they left off the $500 and said it was $50. They make it $60 by adding the $10 attorney fee to the $50.

It is true that Humes told Laughlin and Finley that an attorney's fee of $10 was taken out of Anderson's first pension pay.

But it is as Laughlin says it was—an attorney fee, but not Humes' attorney fee. Whereas Finley tells it that it was Humes' attorney fee. That Humes took it. That Humes said he took it.

Well, now, Humes never told Finley any such thing, and Laughlin says Humes never said any such thing.

Humes knew Chiles was Anderson's attorney. Humes knew that the $10 attorney's fee, in the regular course of business, like the pay of the pensioner, was sent by check to the attorney to his address. And he would not have been such a fool as to have told such a meaningless falsehood; that could have been of no possible benefit or advantage to Humes, and that could have been so absolutely false, and so easily proven to have been so.

Anderson, R., p. 22.

Q. Do you know—can you fix the date now that you were in town here and got the money from Mr. Humes, any better than you have done? You say it was in October. Now, what day of the week or the month was it? Do you know?

A. No, sir; I don't know. 'Bout as near as I could

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If I had taken notice maybe I could have thought of the day.

come at it, I think it was on October 29.

Can you believe from these, his own statements, that he knew about October 29th, or any other date?

He says he don't know. Can't read or write. Can't keep count. Then he undertakes to say when it was, after making such statements that he don't know.

Can any one believe after what he says that he did or could know?

Don't know, can't keep count of recent dates, daily transpiring transactions, and yet he swears he knows—can fix with absolute certainty without anything to help him fix or show it—the date, day and month of a transaction over a year past. Is it possible to believe this?

Anderson, R., p. 19.

Q. Did you get any word from Mr. Humes to come there to his office?

A. Yes, sir; I did get it.

Q. What sort of way did you get it?

A. I got word.

Q. *Did he write to you?*

A. *He didn't write to me.*

Q. *He didn't write to you?*

A. *No, sir.*

P. Finley, R., p. 37-8.

Q. How came you to go there that day?

A. *The old man had received a note from Mr. Humes telling him to come in and see him about some papers.*

Q. *What kind of notice did he receive?*

A. *Just a note saying come in.*

Q. *Do you know what became of that note?*

A. It just said, "Come in and see me about some papers." It was very short. *It got misplaced.*

Do you know what the date was?

A. That was dated in

> October some time; I don't remember the date of it.
>
> R., p. 40.
>
> A. *Well, the old man received this notice from Mr. Humes* . . . . but on Monday evening his stepdaughter came in and brought him some more notice about [illegible] money being here. . . .

This is what the trial court terms Anderson's corroborating witness.

We submit the proper term would be contradicting witness.

Here Anderson made a great mistake. This, which was the truth, and not any part of his made-up story, he failed to remember. Finley did not practise Anderson enough on this to make him remember it.

And if Anderson intended to tell the truth in this case in all things, why was it that here he told such a willful falsehood? Here he did get several notes from Humes, and what was his object in telling such a willful and uncalled-for falsehood about so immaterial a matter as to how he was notified by Humes to come in and see about his papers.

Finley here flatly contradicts Anderson, and proves that his statements about it were falsehoods. Anderson told two falsehoods about it. Said he got word when he didn't, and then denied he got a note when he did.

Finley says the note or notes came. That it was dated in October sometime. This fixed the date. And Finley and Anderson had it from Humes, and yet they do not produce it, but Finley says it was mislaid. Is it not passing strange that so important a paper as that fixed all this should have been misplaced? Is not the in-

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ference absolutely irresistable that it was another link in the chain that would have welded defendant's innocence, and that by design Finley misplaced it?

R, p. 20.—Anderson says he and Finley did not go together to Humes' office that day.—R., p 28.

This is strange. Anderson swears Finley was with him every time he was at Humes's office, except the day he says he got the $50. And Finley swears the same.—R., p. 38.

Anderson R., p. 20.

He states he went down to the wagon yard and gave Finley his money.

Q. Did Finley count it?

A. He took the money and came back to Humes' office.

P. Finley, R., p. 38.

Q. Did you count the money?

A. Yes, sir.

(Objected to by defendant's counsel as leading).

The Court: It is a little leading, *but this old man moves up so slowly, I wish you would let him lead a little.* R., p. 21.

In other words, it is an illegal mode of examining a witness, but in the trial of this man for his liberty the trial court does not sustain the objection to this illegal mode of examining a witness in the trial of a man on trial for his liberty, but asks that the District Attorney be allowed to proceed a little illegally. This is the astounding proposition that is made.

R., p. 22. Anderson states: "Mr. Humes gave me that pension certificate on the 4th of last month"; (November, 1895).

The Court: And he says he got it the 4th of last month, when it was handed to him by Mr. Humes.

A. Yes, sir.

R., p. 33, Anderson states that on the 4th of last month (November, 1895) he went to Humes's office, signed a voucher and sent it up to Knoxville. And that

he came to town on the 4th of last month (November, 1895) in Finley's buggy, and with him went to Humes' office.

This is given just to show how recklessly this ignorant old man will swear as to particular dates that he tries to fix.

Fortunately for defendant these people's hard swearing can't change the calendars of the years or dates and days of the week. If they could do so, they have shown every disposition to do it. November 4, 1895, was *a Sunday*. So nothing Anderson swears to is true. It all, in fact and truth, took place on *Monday, November 5, 1895*.

Anderson, R., p. 22.

Q. *Did you get a receipt from anybody shortly after you got it (850) from Mr. Humes?*

A. *No, sir.*

Q. *Did you get any receipt for it?*

A. *Yes, sir.*

He swears he didn't get a receipt and he did get a receipt. So if you are going to believe him, which one will you believe? The same question answered both ways, within five or six questions of each other, and within a few seconds time of each other. You might call this a swift witness. He can swear both ways very quick and in a very incredibly short time.

Q. Did you owe Mr. Finley anything? A. I owed him a little. R., p. 22.

Q. What for? A. Well, *for money I had borrowed from him before that time* on a cow.

This last answer of the old man was rather a surprise to all, because the theory of the prosecution was that it was money due from Anderson to Finley for a cow. Finley and his father, the so-called supporting and corroborating witnesses, both so swear in their evidence cited beyond. The theory that *it was borrowed money* was rather a new departure by the witness. It was not

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exactly in line with the plot as it thickens in their many contradictory statements of each other.

Anderson. R., p. 22.

Q. Did you pay him (Finley) any money for that cow? A. Yes, sir.

Q. When did you pay that to him? A. *I paid it to him* the next day after I drawed the money.

Q. Have you got that receipt? A. Yes, sir.

Q. Well, let us have it. (Witness hands him receipt).

And we are treated with another surprise here, and taken back, as shown by the next question. The receipt read, "received of Mary Anderson."

Anderson. R., p. 23.

Q. Who is Mary Anderson? A. That's my wife.

Q. Did you pay that money yourself or who paid it for you? A. Yes, sir; *I give my wife the money to pay it.* I wasn't able to go up to the house and pay it.

Q. And that was the *day before you gave your wife the money* and she brought you that receipt? A. Yes, sir.

P. Finley.—R., p. 40.

Q. Tell how this is? A. Well, on the next day after the old man received his money he owed my father $15 for a cow and calf, and the next morning after we came from Memphis that day *he* paid the old man for his cow and calf. He gave the old man a receipt.

Q. Mr. Finley, you say he owed $15 to your father for a cow and calf, and paid him the day after he got his money? A. Yes, sir.

Q. I suppose from your testifying about it, that it was *something you knew yourself?* A. Yes, sir.

P. Finley.—R., p. 41.

Q. *You saw him pay your father?* A. *Yes sir.*

Q. *The old man pulled out the $15 and handed it to your father?* A. *Well, of course, he owed him for the cow.*

Q. *He owed him for a cow and pulled out the $15 and counted it out to him?* A. *He did not count it out.*

When he give me his money down at the wagon yard, he asked me to count it and carry it home for him and I did, and he told me to keep it till the next morning and he or his wife one would come and settle with my father for the cow.

Q. *And he came up?* A. *Well, his wife came, I believe.*

Q. *So you already had the money.* A. *Yes, sir; but it wasn't coming to me—the cow money.*

Q. *And you kept out $15?* A. *Well, I had all his money.*

Q. *What did you do with the other $35?* A. *Well, I made the change with the old gentleman that morning, and then his wife got $15 to come to town with.*

Q. *You kept the rest yourself?* A. *Yes, sir.*

Q. *He did not keep the money himself, then?* A. *No, sir.*

Q. Did he ask you to keep it? A. He asked me to carry it out home for him.

Q. *You took it and kept it?* A. *Yes, sir.*

Q. The next morning he was over at the house? A. Well, I don't remember whether he was or not, but I remember his wife was.

Q. You were a witness in this case before? A. Yes, sir. R., p. 42.

Q. You testified before? A. Before.

Q. Before the jury week before last? A. Yes, sir.

Q. *Did you make any statement to that jury about cow?* A. *No, sir.*

Q. *None at all? Did you not state to that jury that you did not know the date when the old man came in town and went to the wagon yard and you counted his money, but it was somewhere between the 20th and 30th of October?* A. *Yes, sir; I stated it was between 20th and 30th October.*

Q. *You told the jury nothing about this cow transaction on the former trial?* A. *No, sir.*

Q. *Well, Mr. Finley, you knew just as much then as you*

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do now about it? A. Well, it slipped my memory at that time, but in looking over the old man's papers the other day I found the receipt.

Q. You mean by the old man, Anderson? A. Yes, sir.

Q. So you and the old man have been talking about it? A. I was down there looking over his papers.

Q. Over Anderson's papers? A. Yes, sir.

Q. And talking about his testimony in this case and about your testimony? A. Yes, sir.

Q. And you just ran across this receipt? A. Yes, sir.

Q. Mr. Finley, you don't mean to tell the jury that you had forgotten all about that cow transaction? A. Yes, sir; I had forgotten about it till I came across the receipt.

Q. You did not remember that your father had sold him a cow a little over a year ago, and that you took the money out of his pension money? A. Well, he had sold him the cow nearly two years before he paid him.

Q. You had forgotten all about the fact that you had held out $15. A. Yes; I had forgotten all about keeping out $15.

Q. And yet you remember now that it was on a Tuesday and a Saturday? A. Yes, sir.

Q. And that it was on a Monday when you came the last time? A. Yes, sir.

Q. You remember the days of the week? A. Yes, sir.

Q. And couldn't you remember the collection of the $15? A. Well, no, sir; I didn't remember that.

A. Finley, R., p. 51-3.

Q. Was he owing you anything at that time? A. Yes, sir; he was owing me for a cow and calf.

Q. Were you paid finally? A. Yes, sir; *he paid me.*

Q. Is that the receipt you gave him? A. Yes, sir.

Q. *The old man paid you* for the cow? A. Yes, sir; *he paid me.*

Q. This receipt says received of him $15? A. Yes, sir.

Q. *Was this receipt right?* A. *Yes, sir; that is right.*

Q. *That tells the way it happened, does it?* A. *Yes, sir.*

A. Finley, R., p. 53.

Q. *This says, "received of Mary Ann Anderson."* A. *Yes, sir. That was his wife. He did not come over that morning. His wife came over.*

Q. *Well, now, Mary Ann did not hand you that money at all, did she?* A. *Yes, sir; she handed me the money.*

Q. *She handed you the money, Mr. Finley?* A. *Yes, sir.*

Q. *Stop and think of that. Did Mary Ann hand you the $15 herself?* A. *Well, I think I may be a little mistaken. My son had the money that he brought from Memphis in his possession at that time, and she came up and said that Wm. Anderson had told her to come up and get the money from her son, but whether she paid it to me I won't be positive.*

Q. *You don't know whether she handed it to you or not?* A. *I don't know for certain. I don't recollect.*

This evidence of these three witnesses, Anderson and the Finleys, son and father, shows the studied plan of their evidence as planned, made up and delivered before the jury on this trial. You see so plainly marked, in the evidence of each, the theory of them all.

It is made too plain that they all made it up that each should swear that Anderson paid old man Finley the $15 for the cow.

Anderson swore to it and adhered to it until the District Attorney called upon him to produce the receipt.

It showed it was written to Mary Anderson.

In this trumped up claim of P. Finley a most fatal mistake had been made in writing the receipt. It read, "received of Mary Anderson." So the written paper that they had fixed to fix their evidence by was wrong. And not only would not fix it but worked a direct contra-

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diction of the story they had made up and so steadily adhered to swearing to.

Who is Mary Anderson? is the next question that is asked Anderson after he surprises everybody by producing a receipt that reads, "Mary Anderson."

And he answers, "That's my wife."

And even after he is forced to show the receipt, and that it is to Mary Anderson, with what persistence does he adhere to the same theory, for even then he swears

Q. By the District Attorney—"Did you pay that money yourself, or who paid it for you?"

"Yes, sir; I give my wife the money to pay it."

And to this—mark the low cunning of the old man—he adds another falsehood to it to make it more plausible: "I was not able to go up to the house and pay it."

Not one word of Anderson's evidence on this point is the truth.

He did not pay old man Finley the money for the cow.

He did not give his wife the money to pay for the cow.

And his wife did not pay the money for the cow.

He did not have his money at all. P. Finley had at his own house all of Anderson's money, and P. Finley paid his father the $15 out of the money he had in his pocket. P. Finley says (R., p. 41), "*I made the change with the old gentleman* (referring to his father) *that morning*, and *then his* (*Anderson's*) *wife got $15 to come to town with.*"

As he there says and shows, he made the *change with his father that morning. As shown by the statement itself before anyone else was there that morning but Finley and his father. He made the change with his father.*

And then he says, "*Afterwards Anderson's wife came over and got $15 to come to town with.*

But the evidence of P. Finley shows how they adhered to the theory that Anderson paid it.

P. Finley says: "He (Anderson) paid the old man (referring to his father).—R., p. 40.

Q. It was something you knew yourself? A. Yes, sir.

Q. You saw him pay your father? A. Yes, sir.

Q. The old man pulled out $15 and handed it to your father? A. Well, of course he owed him for the cow.

Q. He owed him for the cow and pulled out the $15 and counted it out to him?

[Hard pressed many times to tell how even how they claimed their made-up story was done, at last he is forced to tell or make up some story to try and fit the receipt he produced, and he says, dug up, although we submit the facts show no such thing really ever in fact took place].

A. He did not count it out. When he gave me his money down at the wagon-yard he asked me to count it and carry it home for him, and I did, and he told me to keep it till the next morning and he or his wife one would come and settle with my father.

He has been telling us all along that Anderson paid his father. Anderson came over. But now it has been forced out of him and he is trying his best to tell a story that will fit all around and he says "and he or his wife would come" and settle with my father for the cow. Why did he not wait for he or his wife to come and settle with his father? Why did he make the change with his father that morning and pay him the $15?

"Well, I already had all of his money," he said. We have no doubt of this. He says "I made the change with the old gentleman that morning and paid him the $15, and then his wife got $15 to come to town."

Q. You kept the rest yourself? A. Yes, sir.

Q. He didn't keep the money himself then? No, sir.

Q. You took it and kept it? A. Yes, sir.

We do not in the least question this statement. We

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believe it is absolutely true, and that if Anderson ever lost any money, this gentleman, as he says, took it and kept the rest whatever it may have been, and as we think the record fu'ly shows.

There is another very pregnant fact about this witness' evidence, and this evidence.

Anderson on the former trial said not a word about the cow transaction.

P. Finley said not a word about it or the receipt. Or A. Finley.

P. Finley claims he had forgotten it. Forgotten that he had paid his father the $15, but remembered the days of the week he tries to swear to—or at least tries to swear he remembers the days of the week of occurences.

His testimony shows another thing, that he was at Anderson's house talking to him about his evidence and about his own. Fixing their story.

A. Finley adheres to their theory too.

Q. Were you finally paid? A. Yes, sir; he paid me. R., p. 51.

Q. The old man paid you for the cow? A. Yes, sir; he paid me. R., p. 53.

This receipt says "received of him $15?" A. Yes, sir.

Q. Was this receipt right? A. Yes, sir; this is right.

Q. That tells the way it happened, does it? A. Yes, sir.

Q. This says, "received of Mary Ann Anderson." A. Yes, sir. That was his wife. He did not come over that morning. His wife came over.

Q. Well, now, Mary Ann did not hand you that money at all, did she? A. Yes, sir; she handed me the money.

Q. She handed you the money, Mr. Finley? A. Yes, sir.

Q. Stop and think of that. Did Mary Ann hand

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you the $15 herself? A. Well, I think maybe I may be a little mistaken. My son had the money he had brought from Memphis in his possession at that time and she came and said that William Anderson had told her to come up and get the money from my son, but whether she handed it it me I won't be positive.

Q. You don't know whether she handed it to you or not? A. I don't know for certain; I don't recollect.

R., p. 23. Objection to the introduction of the receipt.

(Objected to by defendant's council as incompetent.) The court ruled the paper admissible only for the purpose of aiding the witness' memory in fixing the date; to which defendants' counsel excepted. The paper was then read to the jury by the District Attorney, it being dated October 30, (1894.)

Admissible only for for the purpose of aiding witness' memory in fixing the date.

This witness, Anderson, swears more than once that he can't read or write. Can't tell one paper from another. Don't know a single word, letter or figure on the paper. Don't know the day of the week or month it was, he repeatedly says. Can't keep count of the daily transpiring occurrences. Could not count money when it was given to him on the witness stand.

And yet a written paper is ruled competent to aid him to fix a date.

If he had been born totally blind in both eyes, could it have aided him any more than it could this witness on that stand?

If he had been a dumb man, could he have spoken less of the truth?

If he had been totally deaf in both ears, could he have given less heed to it in his testimony?

If the receipt had been written in Sanscrit, or Hebrew, or Chinese, or any other foreign or dead language, like the Greek or Latin, it would have been just as intel-

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ligible and easily read by this witness as our language, or any other hieroglyphics.

The District Attorney still, as it is seen, supposed that Anderson had in truth given his wife the money, as he had sworn he had. The fact had not then developed that P. Finley had kept the money and paid it, and so the question was put: "Before you gave your wife the money?" A. Yes, sir.

Q. I show you this paper (handing paper to witness). Can you read or write? A. No, sir; I can't read or write, either. R., p. 23.

These witnesses say Anderson's wife paid A. Finley. And the receipt is in her name.

Is it not strange beyond comprehension that they never introduced this so important witness, if this transaction was real, *bona fide* and the truth? No, it was a made-up story, and Anderson had broken so badly, and Finley, son and father, forced to break so badly, that P. Finley would not risk another witness he had to train and practice so hard.

Anderson, R., p. 21.

Q. Nor any paper—voucher like that (showing paper)—for you to sign? Did you sign any paper at all on that other day that you went back for your first quarterly payment?

A. No, sir; I never signed no check at all.

R., p. 23.

Q. On the day that he paid you the $50 did you make your mark on the back of that paper on that day?

A. No, sir; I didn't.

Anderson, R., p. 29–30.

Q. See if you signed that paper (handing paper to witness). You say that you counted the other money at the office and it was in bills?

A. I don't know whether I signed this or not. I couldn't tell one paper from another. I signed a paper like this, but I couldn't tell whether I ever signed that one or not.

Q. Well, did you sign a paper like that one on your first quarterly payment?

Q. Well, did you make your mark to a paper like that on that day?

A. That same day I drawed that $50?

Q. Yes.

A. No, sir.

Q. Well, did you sign a paper like that on the day you went back there to draw your first quarterly payment?

A. *Like which one, that check? No, sir.*

Q. At that time did you sign a paper like that (handing another paper to witness).

A. No, sir; I didn't.

The Court. *He says he never did sign any check?*—R., p. 35.

A. *No, sir; I never did sign any check. I didn't make nary a one.*—R., p. 32.

A. Yes, sir; I signed one that day.

Q. The day you drew the first quarter after you had gotten the $50 the first time you were back?

A. Yes, sir; I signed one after I drew the first quarter.

Q. At the time you drew your first $36 did you sign any papers at that time?

A. *Yes, sir; I signed a paper like that (indicating a check).* R., p. 23.

Q. And the next time when you got the first quarter you signed one paper?

A. Yes, sir.

Q. That was a voucher, a long red paper?

A. Yes, sir; "I never seen any (check)."

The compliment of the answer he made to the court is (R., p. 23): A. *Yes, sir; I signed a paper like that—(indicating a check).*

Q. Did you not tell the jury awhile ago that you had signed a paper like that to go to Knoxville and that you remembered that? R., p. 35.

(Objected to by District Attorney as leading).

Q. I so understood him and I want to be sure. I understood you to say, William, that before you got any $50 you came in here to Mr. Humes's office and you signed one of these papers that we call vouchers, but it has been described to you as a "long paper." Am I

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right or wrong about it? Did you say you had made your mark? A. You must be right about that, signin' that paper.

The Court:

Q. Do you mean that you signed it?

A. Yes, sir; I did sign one before I got $50. I signed one paper.

Q. But you never did sign any paper at all there (Humes' office) before you got that $50?

A. No, sir.

Anderson was most too modest for P. Finley. Anderson had not gone the whole length. This was left for P. Finley to do, and without a moment's hesitancy he did it. Anderson said he signed his voucher that went to Knoxville before he got anything. That when he got his first quarterly, he signed both a check and voucher. But it was left for P. Finley to swear to it right, and he did so. R., p. 40.

Q. Did Anderson come in for that quarter, do you know? A. Yes, sir; I came with him.

Q. Were any papers signed at that time? A. No, sir.

So that here is Anderson's evidence on another vital point. He is up against it again.

Here he is against his so-called supporting and corroborating witness, P. Finley, again.

And the above is Anderson's oft-repeated self-contradictions of himself.

And the court is asked, which are to be believed as the truth? Does not the witness destroy himself by his own contradictory statements of himself?

R., p. 24, Anderson.

Q. How old are you? A. I don't know sir, how old I am. I couldn't tell how old I was, because I don't know.

How can you measure the depth of the lack of intelligence of a person who says he don't know how old he is?

Q. "You have no idea how old you are, have you?"

A. "No, sir; I don't have no idea."

Is there any measure to the density of the ignorance of a person who has no idea how old he is? But he adds to the last answer, "I'm somewhere 'long about 75, I reckon."

Anderson.—R., p. 25.

Q. I will see if I cannot refresh your recollection. Now did you ever go there and take some drinks?

A. Oh, I didn't drink none 'thout I was sick.

Q. How long since you drank?

A. Well, I couldn't tell you. It was such a little I never took notice of it.

Finley, a supporting witness as it is called, testifies on this same point in regard to Anderson.

Q. He gets drunk occasionally?

A. He used to get drunk. I have not seen the old man drinking for a long while.—R., p. 54.

Q. You did not drink any last year?

A. Not none to hurt nobody.

Q. Now, Anderson, there is a difference of opinion about hurting anybody. Well, you did drink some, didn't you?

A. I drink water and coffee and one thing and another. I dont drink no whisky.

Q. Nor beer?

A. No, sir.

Here he swore he did not drink any whisky or beer. Tried to make the impression that he never drank at all.

And here is his supporting witness that swears he used to get drunk.

So what he swore was far from being the truth about this.

Besides making several contradictory statements about it himself.

First, he said, "Oh, I didn't drink none—'thout I was sick."

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Q. How long since you drank?

A. Well, I couldn't tell you. It was such a little I never took no notice of it.

Q. You didn't drink any last year?

A. Not none to hurt nobody.

Q. Well, you did drink some, didn't you?

Notice how in his next answer he tries to throw the questioner way off:

"I drink water and coffee and one thing an' another."

Then comes out with a positive denial:

"I don't drink no whisky."

Q. Nor beer?

A. No, sir.

A. Finley, the so-called supporting witness, swears Anderson used to get drunk.

So Anderson, to say the least of it, did not tell the the truth about this.

Anderson. R., p. 28.

Q. (71X) Where was Laughlin then?

A. God knows; I don't.

Q. (72X) Was he (Laughlin) at Mr. Humes' office?

A. Yes, sir.

This is just submitted to show how this witness swore.

In one breath he swore he did not know where Laughlin was.

And in the very next breath he swore Laughlin was there in the office.

How can you believe or rely on what such a witness swears?

Anderson. R., p. 29.

Q. Why did not you count it (money)?

A. I did count it.

Q Where did you count it?

Q. Now, you say that you signed one of these papers—the large paper. If you are not too much bothered now, see if you can

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A. I counted it as he give it to me. I counted by the bills. I just took it an' looked at it like openin' the leaf of a book. I knowed what sort o' bills they was.

Q. You did count it at the office, though, before you left the office?

A. I counted it.

Q. Do I understand you correctly to say that you counted that money, that $50, at Mr. Humes' office? Am I right about that?

A. Mr. Humes took the money an' counted it, like my finger, so (indicating), and says: There is $50.

Q. Did you count it?

A. Well, I took his word for it.

count that (handing some money to witness). Look at those bills. Do you know what those bills are? Count that money and tell us how much there is. (The witness here looked at the bills handed him and attempted to count them).

Judge Greer: How much is there, Anderson?

The Court: Can you count that or not?

A. I can't tell you, 'zactly.

Judge Greer:

Q. The other was in bills, just like that?

A. Yes, sir.

Here he swore he did and could count money, but when pinned down to it on the witness stand it is shown he couldn't.

And now I give the so-called supporting witnesses again, to swear that Anderson could count money. See what they say:

P. Finley, R., p. 43.

Q. Can Anderson count?

A. You mean money?

Q. Yes.

A. No, sir; he can't count money correctly.

A. Finley, R., p. 54.

Q. He (A.) can't count money?

A. Well, I don't suppose he could count bills of money.

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Here is what is called corroborating evidence. We would call it contrary evidence.

Anderson, R., p. 30.

Q. What time of day was it?

A. Well, it was long about 12 or 1 o'clock; between 12 and 1.

P. Finley, R., p. 46.

Q. Mr. Finley, when you came in that morning—I allude to the day that you counted the $50—you and Anderson got here early in the morning, did you not?

A. It was between 10 and 11 o'clock, I think, when we got to town.

Q. And it was about 3 o'clock when you met him at the wagon yard?

A. Between 2 and 3 o'clock.

Q. You got here between 10 and 11 in the morning, and you saw him start off to Mr. Humes' office, and then you did not see him any more until between 2 and 3 o'clock at the wagon yard. That is correct, is it not? A. Yes, sir.

Q. Where the old man had been in the meantime, or what he had done, you of your personal knowledge do not know? A. No, sir.

Anderson, R., p. 30-7. A. to Q. Did not make that mark on that check, and Mr. Humes and Mr. Purcell did not witness it. Did not sign it in the presence of those persons and did not make mark on it. And then

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he did not take it in his hand and did not go with Sanderlin around to the Mechanics' Savings Bank, corner Main and Madison. Sanderlin never went with me in his life, nowhere. I don't know him.

Though he served in the regiment in the war with him. And he did not go with the paper and present it to the cashier and did not say that he was Wm. Anderson, and the cashier did not ask Sanderlin who went round to identify him, if he were Wm. Anderson, and Sanderlin did not identify him. Mr. Young Humes, the cashier, did not pay him $536.40 on that check on October 8. He never seen any. All this Anderson testifies.

Q. In going down the steps, don't you remember to have met a colored woman who was after a pension herself, and that you had a piece of paper in your hand?

Mr. Simonton—Q. What steps, Colonel?

Col. Gantt—Q. Lowry Humes' steps. (To witness) That you had the paper in your hand and Sanderlin was with you, and said, or you said, that you were going round the bank to get the money? A. No, sir; I don't *recollect* nothin' about it.

Q. And these large papers, you say you signed one of them? You say you remember to have put your mark on these papers? Did you put your mark on more than one of them? A. Yes, sir.

Q. And each time you put your mark on at Mr. Humes' office, did you? A. Yes sir.

Q. Do you know what you signed that paper for—those papers? A. Yes, sir.

Q. And what did you do that for? A. Well, I signed it to draw money on it.

Q. After you had signed that paper it would go to Knoxville, wouldn't it? A. Yes, sir.

Q. And about a week or ten days after that your check for the money would be due? A. Yes, sir. R., p. 32.

Q. When did you cease to go to Mr. Humes to get

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it? When did you quit? When was the last time you went to Mr. Humes and signed any voucher, and it was sent up to Knoxville and in about a week or soon afterwards your check came? When was the last time? A. Let me see. I signed the last voucher that was sent up to Knoxville to get my money; I signed it at Mr. Humes' office.

Q. The last voucher? A. Yes, sir. R. p., 33.

Q. Well about how long was that, two or three months? A. No, sir; I told you just as plain as I could it was on the 4th of last month I signed it to go up to Knoxville.

It was not the 4th—that was Sunday. But it was Monday, Nov. 5, 1895. This shows how recklessly the old man guesses, and swears so positively to a date.

Q. Well, that would be November 4th, wouldn't it? A. Yes, sir.

Q. And the 4th of last month you went to Mr. Humes' office and signed one of these vouchers, and that voucher was sent up to Knoxville, and then in a week or so after that the check came, didn't it? A. Yes, sir.

Q. How did you come to town on the 4th of last month? A. I come with Mr. Finley's buggy.

Q. Was he with you at Mr. Humes' office? A. Was he with me? Yes, sir; he was with me.

Q. He went with you to the office. A. Yes, sir.

Q. That was on the 4th of last month? A. No sir; let me recovery back. It wasn't Mr. Finley; Mr. Finley was sick. His brother went with me.

Q. Now, that was when you signed the voucher, not when the check come? Did you go again to Mr. Humes' office to get the money? Yes sir; I went to Mr. Humes's office.

Q. And then you got the money on the check, did you? That was eight or ten days after November 4th? A. Oh, yes, sir; I got the money on the check, but I tell you how I got it on the check; I trade down here

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with Mr. Polk and Spining, *and it was too late for me to go to bank*, and I went there and they cashed it for me.

Q. And it was the next day you sent the money to pay for the cow? A. Yes, sir.—R., p. 34.

The court: *I wish you would ask him whether, when he got that $50, he knew there was more due him, and why he did not say anything about it if he did.*

Re-examination by Mr. Simonton:

Q. When you got your $50 did you know that was all the money that was coming to you or not, in your first payment of pension money? A. I thought it—I thought it was more comin' to me.

Q. Did you say anything to Mr. Humes about not getting enough, or anything of that sort? A. Mr. Finley did; he went up there.

Anderson:

Q. *But was there anything that passed between you and Mr. Finley about not being enough money at the time you got the $50?* A. *No, sir; I didn't say anything.*

P. Finley.—R., p. 39:

Q. *Why were you going down to see Mr. Humes?* A. *Well, the old man complained that he thought he had not been dealt with fairly, and asked me if I would investigate and see about it.*

Q. What did Mr. Humes say? A. He said that was what was 'lowed to old soldiers.

The court: *And he says he told him that when his quarter fell due there would be some more. What I want to know is why he took $50 and said nothing, and went away from there. It seems to me that needs clearing up.*

Q. Did he say anything about whether there was any more or not, or whether he kept any. A. No, sir; he didn't say whether there was any more, or whether I'd get any more or not, or anything 'bout it at all.

Q. What did he say about the quarterly payment? A. He said, in a few days come an' I'd draw some—$36—an' it wasn't more than ten or fifteen.—R., p. 35.

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Judge Greer: Q. Now, how much money did you get each month. A. $36.

Q. You get that every month? A. It comes to me every quarter—every three months.

Q. And you know that means $12 a month? A. Yes, sir. R., p. 35-6.

Q. And you know that was what was allowed you for your first payment, too, didn't you? You know that you were getting some back money that was allowed you? A. *Yes, sir.*

Q. And you know it was at that kind of a rate, didn't you? A. Yes, sir.

Q. *And you expected to get your back pension when you went in there, and Mr. Humes gave you the $50?* A. *Yes, sir.*

Q. *And you knew you would get $36 four times a year?* A. *Yes, sir.*

Q. *And you knew that this was for back pay?* A. *Yes, sir.*

Q. *Did you know your pension had been allowed when you got that $50?* A. *Yes, sir.*

Q. *Did you know it before that time?* A. *Yes, sir; I knowed it.*

Q. Who told you? A. Why, I was told that when I was mustered out.

Q. You don't understand. *You made an application to Mr. Deaderick to get a pension?* A. *Yes, sir.*

Q. You did not get that right away? A. No, sir.

Q. *Did you know when you went to Mr. Humes to get the $50 that it had been allowed?* A. *Yes, sir.*

Q. *How did you know?* A. *Well, Mr. Humes told me himself he expected I'd get $300 or $400.*

Q. When did Mr. Humes tell you that? A. It was the first time I begin goin' to him. He said, "*You'll get a right smart when you begin to draw*"

He says he used to know defendant. R., p. 18. And

yet he swears that he made out his voucher for him on the last draw day in November, 1895, before this trial.

Anderson, R., p. 20.

"Mr. Laughlin came with me, but he went right out." R., p. 28.

Q. Mr. Laughlin was not with you when you say you got the money?

A. He wasn't there when I got the money, but he was there when I got there and I met him when he was comin' away in the room up stairs; I met him and he come away.

Laughlin, R., p. 49.

Q. If you had met Wm. Anderson?

A. I have no recollection that I did meet him.

A. Of course I told you I met him and he come away. A. I met him.

Q. He was coming down and you were going up? Did you say anything to him—Mr. Laughlin? A. No, sir; I didn't say anything to him. A. *I don't know whether I saw him or not.*

R., p. 26.

Q. Where would you get off the car when you got to Memphis? A. Get off at the wagon-yard down here.

Q. How far is that from here? A. Well, 'bout three-quarters of a mile I reckon, or a mile. Well, it's a mile.

Q. Then how would you make the balance of the distance from the wagon-yard; would you walk it? A. Oh, yes, sir; comin' on the street ain't like walkin' on the ground an' muddy.

Q. *A fellow can walk a heap further on the street than out in the woods or on the farm?* A. *Yes, sir.*

Q. You came on the car and stopped at the wagon-yard and wanted to come to Mr. Humes' office? A. Yes, sir.—R., p. 27.

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Q. Now, Mr. Humes' office was either here on Madison street, or over on Court street? A. I reckon it was.

Q. Well, it was about three-quarters of a mile from the wagon-yard? A. I reckon so, sir. I don't know 'zactly; near as I can come at it.

Q. Would not the car have brought you and put you off within 50 yards of his office? A. I was talkin' to the attorney 'bout when we come.

Q. I am talking about the car bringing you within 50 yards of his office, and yet you say you got off at the wagon-yard and walked three-quarters of a mile? A. Well, I did.

Did you get off at the wagon-yard every time? A. No, sir.

Q. Where did you get off? A. Got off down the street here; down Main street.

Q. So you would be pretty close to Mr. Humes' office, and the walk would be a pretty short one? A. Mr. Humes' office, when I went there, was over on that next street—R., p. 27.

Q The car would come pretty close to his office wouldn't it? A. Yes, sir; I guess it would.

Q. Yes, you have come to Raleigh and come to Memphis, and concluded not to stop at the wagon-yard and come three-quarters of a mile to Mr. Humes' office? A. No, I was talking 'bout when Mr. Finley come with me, *and come with his mules with the wagon. I stopped the buggy at the wagon-yard.*

Q. Well, see if I remember you right now. I understand you to say you hardly remembered ever to have come all the way through in the wagon from Mr. Finley's place last year? A. That is the way you would come in the winter time toward the first of the year.

Q. I asked you did you come from his place to town in the wagon or buggy, that you can remember, and if so, how often? A. I couldn't tell you how often

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I tell you I was sick. I can't remember how often, but I know I come, but I can't tell 'zactly how often.

Q. Well, did you most commonly come in the car? A. I come in the car a good many times, and then when it was wet an' rainy we'd come on the car.

Q. Well, now, you say that every time you went to Mr. Humes' office Finley went with you? A. Every time except that time the day that $50; he was down at the wagon yard and he went up there after I went away.

Q. You don't know whether he went there or not? He told you he did, I suppose; you were not with him? A. I wasn't with him.

Q. He wasn't with you on that occasion? A. No, sir.

Q. He was not with you when you say you got the money? A. No, sir.

Q. Can you count money? A. Well, I can sometimes, when I ain't in trouble. R., p. 29.

Q. You can't count it when you are in trouble? A. Well, when I'm bothered like I am now you might give me money now here to count an' I couldn't count it, "when I ain't in trouble" "when I'm bothered like I am now."

Did it ever trouble a person when they were telling the plain, simple truth? Does it ever bother them? Never. No witness, however ignorant or wise, was ever troubled or bothered by telling the plain and simple truth. It does, though, trouble and bother and perplex the wisest person when they try to tell and keep straight a made-up story like this, and no wonder the ignorant old man should have cried out twice in the agony and anguish of his perplexity that he was in trouble and bothered.

Q. You come in frequently, didn't you, on the

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cars? A. No, sir; no more than when I come to see 'bout drawin' my pension.

Q. *You were never in Memphis except for that purpose?* A. *That's the only time I come.* R., p. 25.

Q. How long does it take you to come from Mr. Finley's place to Raleigh? A. I don't know, sir; never took no particular time, always come as quick as we could.

Q. Did you ever come all the way from his place up there to Memphis in his wagon? A. Yes, sir; I come all the way with him in the wagon—all the way from his house to Raleigh.

Q But I mean to Memphis. Did you come all the way from his place? Now, it is nine miles to Raleigh, then and three miles from there out to his p'ace. Now, did you come all the way in the wagon, or did you come to Raleigh in the wagon and the balance of the way on the car? A. Well, since I study a while, 'case I don't recollect acomin' in the wagon as I know of, although we have come one time in the wagon, but it slipped my memory but this time.

Anderson, R, p. 31.

Q. What year did you go to live with Finley?

A. I don't know 'zactly what year. It's been gwine on four years ago.

Q. What year would four years ago be?

A Well, most anybody could count back; they could tell 'bout that; 'bout '90, I reckon; the year of 1890 I reckon. This here is 1895.

Q. And if this is 1895,

P. Finley, R., p. 43.

Q. How long has he been living there, Mr. Finley?

A. It will be four years this coming January—next January.

Q. So he came there in 1892?

A. Yes, sir.

four years ago would make it 1890?

A. It would be more than four.

Q. Make it five years then?

A. Yes, sir.

R., p. 34.

Q. Did you say anything to Mr. Humes about not getting enough, or anything of that sort?

A. Mr. Finley did it. He went up there.

Q. Mr. Finley, isn't it a fact that you employed a lawyer?

A. Well, of course, Judge, I had no reason to believe that it was any more. *And I made no complaint myself.*

There are two marked facts about this witness Anderson's evidence. He says he thought there was more coming to him when he says he got the $50.—R., p. 34.

He says "Mr. Humes told me himself he expected I'd get $300 or $400.—R., p. 36.

Humes told him, "You'll get a right smart when you begin to draw."

He says he knew his pension had been allowed when he says he got the $50. He knew it was at the rate of $12 a month. He knew he got $36 a quarter. He expected to get back pension when he says he got $50. All these facts he says he knew. And yet he tells the story that he went there and Humes gave him $50, and he went away and never uttered a word of complaint to him. Isn't it ab-olutely beyond the power of a human being to believe this incredible statement?

Another thing; he got his pension in October, 1894. He says Humes only gave him $50. And yet for over a year after he says he got this $50; every three months he went back to this same person to make out his voucher for him. And you have Anderson's evidence with its

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many, many contradictions. Where he many times directly contradicts his own sworn statements. It is absolutely impossible to reconcile them with each other so that you can say which is the truth. He can't read or write. He has no idea how old he is. He can't find a place in a city where he has been going for over a year, and lived for over thirty years. In one breath he says he don't know the day of the week or month. He says he couldn't keep count of recent dates as they transpired. He says it was 'long about in October, 1894, he got his money. He can't count money. He swore he did and he didn't count the $50. He swore he paid the money for the cow, if there ever was any such transaction, when he didn't. Then he swore he gave his wife the money to pay for the cow when he didn't. P. Finley had his money all the time. P. Finley paid the money for the cow if any such transaction in fact ever took place. Anderson swore he never drank. A. Finley swore he did. Anderson swore several times he didn't sign any paper before he got the $50. Then several times he swore he did. He swore at one time in his evidence, several times, that he never made his mark on a check. That "he never seed nary one." Then he swore several times he made his mark on checks. He swore he didn't know one paper from the other, or whether he signed a paper or not. He swore Laughlin was there and that he wasn't. He swore he didn't complain to P. Finley, and Finley swears he did. A. Finley swears he is a dull, slow old man. Can anybody on earth, in the face of this, his own sworn evidence, believe that he knows it was October 29, 1894, when he got, as he says, $50 in money, or that he knows the date when he got his check and went to the bank and got his money on the check, or, as he can't count money, in fact that he knows how much money he got or how much he gave P. Finley at the wagon yard on October 29, 1894, if any such thing ever took place? Is this the kind of evidence that will be taken in denial of

the record evidence of the sworn certified voucher for $546.40 under the official seal of an officer and his mark and oath to the same witnessed by two other persons which he himself says he signed by making his mark to it, and swearing to the same, and it went to Knoxville before he got even the $50 he claims he got? Is such evidence to be taken in denial of the record evidence of the voucher check and bank records; in denial of the witness of the law, as this court terms it, in the Coffin case—the presumption of innocence? Is it such as to overturn this witness of the law—this presumption of innocence, and show guilt beyond a reasonable doubt? Is this such evidence as will be taken in denial of five other witnesses of intelligence?

Laughlin, and P. and A. Finley, it is said, are Anderson's corroborating witnesses.

What is it they will corroborate him in? They say he can't read or write. They don't know how old he is. They don't pretend to say he knows the days of the week, month or year. In fact they contradict him on this question because he swore he went to live with Finley in 1890 and Finley says it was 1892. He says he can and he can't count money, and that he did and he didn't. They say he can't count it. So I take it that is the right side on that question. He can't count money. He and P. and A. Finley swore first that Anderson paid for the cow. Then that his wife paid for it. Then they all swore that Anderson didn't pay for it. That P. Finley had all of his money, and P. Finley paid his father, A. Finley, for the cow for Anderson. They all agree in this as to what that transaction was, or how it took place, if in fact any such thing ever took place, which we submit the facts as disclosed by this record show it did not. They all started out to tell one story about it, and when the receipt was produced they then had to swear the way it showed, whether it was the truth or not, and it was not, as we submit, and the receipt story is nothing but made-

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up evidence out of the whole cloth. He swore he didn't drink. A. Finley cross-corroborated him in this, he swore he did get drunk. Anderson swore he signed many papers. P. Finley swore Anderson didn't sign any papers. This I take it we would call corroborating Anderson where he swore he didn't sign any papers. But to that part of Anderson's evidence, where he swore he did, P. Finley fails to corroborate him. Anderson swore Laughlin was there. Laughlin swore he wasn't. In this Laughton corroborates Anderson's statement where he says Laughlin was not there, but where he says he was, Laughlin fails to corroborate that part of it. Anderson swore he didn't complain to P. Finley, Finley swears he did, but I suppose you call this corroborating or supporting evidence.

But they are to support or corroborate Anderson. What is it about Anderson's evidence that they are going to undertake to corroborate him about? Not as to counting the money, because they say he can't count it. None of them claim to have been with him when he got the check, or whatever it was. They don't pretend to say they were. So they don't know how, when, what, or how much he got. According to their own story he was across the city, three-quarters of a mile from P. Finley. It was 10 or 11 o'clock. And P. Finley says he saw him between 2 and 3. Where he had been or what he had done in the meantime he don't know. He don't know whether he was at Humes' office at all that day or not. But they say they will corroborate him because they afterwards had a talk with Humes, and the proposition is that they will prove that as, or in the nature of, an oral or verbal admission. Well, if this is the case, then we want it considered in the light of the rules of law governing such evidence. It is to be taken and considered as the most unreliable of all testimony, but was it deliberately and understandingly made by Humes? And if so,

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was it correctly understood and reported by Laughlin and P. Finley?

The supporting—corroborating—is to be as to the date, October 29, '94, and the statement of Humes to them on a day in the nature of an oral or verbal admission.

With these rules of law before us, let's see what the witnesses say:

Anderson says Mr. Humes said, "here's $50 for you" (R., p. 20), and P. Finley and Laughlin both state that Humes said it was $60.

So they and Anderson disagree as to what Humes said about the amount.

R., p. 34. Q. (To Anderson by District Attorney) Did Humes say anything about whether there was any more or not, or whether he kept any? A. *No, sir; he didn't say whether there was any more, or whether I'd get any more or not, or anything 'bout it all.*

P. Finley. R., p. 37.

Q. Could you identify what time in October that was? A. I can't the date, but I can the day of the week.

Q. What was the day of the week? A. It was on Tuesday.

Q. Tell as near as you can what time in October. A. Well, somewhere along about the 1st of October; perhaps the 10th or 12th, or somewhere along there; I can't tell, exactly; I remember, though, the day was Tuesday and so the old man did come; I brought him in again.

Fortunately for defendant P. Finley can't swear away the days of the week and month, so as to change the calendar, for he has shown every disposition to do so.

But October 10, '94, was Wednesday and October 12, '94, was Friday.

So if Finley is so sure it was a *Tuesday*, and so sure

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it was the *10th or 12th October, '94*, then his statement is not true, for it was not either.

It was not the 10th or 12th October, '94, if it was *Tuesday, and Tuesday was not the 10th or 12th October, '94, but the 10th October, '94, was Wednesday and the 12th October, '94, was Friday.*

R., p. 39.

Q. State to the court all the conversation that took place as it occurred.

A. After we got down there Mr. Laughlin told Mr. Humes, "I see you paid the old man some money." He said, "Yes, sir; his money come in to-day's mail." He asked him something about the amount, and he said the old man was allowed $60, and he retained $10 and paid the old man $50, and went on to explain that the old man's *pension was allowed under the new law, and was not so much as it would be under the old law*, and was $12 a month. *That was about all that was said, I believe.*

Q. And that it was $60, but he retained $10?

A. *He had retained $10 for his fee, which the law allowed him, and paid the old man $50.*

Q. What explanation did he give about the $50?

A. *Well, that it was granted under the new law; that it was not so much under the old law.*

So here you have it; which one of his statements is true? He puts it both ways. Which one of them was what Humes said to him or in his hearing? That it was not so much as it would be under the old law, or that it was not so much under the new law.

R, p. 40.

Q. Now, you say on that occasion that you came in there and made inquiry about the $50. That was on Monday?

A. No, sir; it was on Tuesday.

Q. Can you fix that date?

A. Yes, sir; I can fix that date. It was October 29th.

And here the witness, P. Finley, has slipped up again. How hard it is to tell a false story and make it all agree. October 29th *was not Tuesday*. But a little thing like swearing the days of the week around on the calendar to make them fit the days of the month never fazed this witness. He has changed it often enough to break himself down in this case. And he kept the practice up with unvarying regularity.

Q. *The first time you were in there was on Tuesday, the next time Saturday, but you cannot give the exact days of the month, but it was in October some time?* A. *Yes, sir.*

Then he is asked if there is any way that he fixes it in his mind.

Then he undertakes to tell the story of the cow transaction.

He never told the cow transaction before the jury the week before in this same case, if any such transaction ever really took place, and we submit the inherent facts show it never did.

On that trial he could not fix the date. Swift witness now, he goes off and trumps up this statement to try and aid him to fix the date.

Does he fix it?

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You have his own statement here for it; he says it was *Tuesday, October 29th. Well, October 29, 1894 was not Tuesday.* So his made-up story here he contradicts himself. Anderson could not remember the days of any week. He did not know he swore, but he tried to *October 29th. And this, P. Finley says, was Tuesday.* So Finley slips on his well-laid plan. Like the three additional facts which he stated on this trial, namely, the cow transaction, that Anderson complained to him, and that he employed Attorney Laughlin and paid him $5 out of Anderson's pension money *the day he got it*, it slipped his memory. Of course it slipped his memory, for if he had have remembered what day of the week October 29th was, he would have swore to it right whatever the day had been, so his story would be straight if his swearing could make if so. A little thing like making the days of the week change around by swearing to them, or the month, why that could never make him hesitate an instant.—Laughlin, R., p. 47.

Q. Well, were you at Humes' office any time last fall, in October, in company with Finley? A. Well, I was there about a year ago, or perhaps I should say last fall; *whether it was October or November I could not be positive*, but one of those months along there.

Q. *Do you remember what day of the week that was?* (R., p. 48.) A. *No, sir; I have no recollection at all as to the day of the week or of the month, either.*

Here is Laughlin's testimony as to the date P. Finley tried to fix. And unquestionably Laughlin does not corroborate or support Finley as to the date he claims it was.

For Laughlin says: "I have no recollection *at all as to the day of the week or the month either.*"

Q. What occured when you got down to Humes office? (R., p. 47.) A. *I*

P. Finley, R. p., 39, says:

"I see you paid *the old*

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believe I did the talking myself, or did the most of it. I believe I commenced the conversation by saying "I see you paid the *old negro $50.*" He said yes; that his pension *money* had come *that morning in the morning's mail*, $60, $10 of which had been retained by him as an attorney's fee, and the balance, $50, he paid over to Anderson. I asked him further as to the evidence that Anderson had about his pension or of his pension, and he stated that his books would be the evidence that the pension had been granted him.

man some money. He said, "Yes, sir; *his money come in to-day's mail.* "He asked him something about the amount, and he said the old man was allowed $60, and he retained $10 and paid the old man $50, and went on to *explain that the old man's pension was allowed under the new law and was not so much as under the old law, and was $12 a month. That was about all that was said, I believe.*

Here is Laughlin and Finley's statements of the same conversation they claim to have had with Humes. And you readily see what different words they so often use in undertaking to repeat what they claim Humes said.

Laughlin says he (Laughlin) did the talking himself, or the most of it. And Finley corroborates Laughlin in the statement that Laughlin did the talking.

Laughlin:

I believe I commenced the conversation by saying:

"I see you paid the negro *$50.*

He said, *Yes;* tha. *his pension money had come this*

Finley:

Laughlin told Humes, I see you paid the negro *some money.*

He said, *Yes, sir; his money come in to-day's mail.*

Laughlin asked Humes

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morning in the morning's mail.

I asked him further as to the evidence Anderson had of his pension, &c.

about the amount, &c., and Humes went on to explain the pension was allowed under the new law, &c.

That was about all that was said, I believe.

So it is too plainly shown by their own words that they do not agree even among themselves as to what Humes, in fact, did say. They really contradict each other as to what he did say. And if they differ so widely as to what Humes did, in fact, say in that short conversation, standing of a few moments, and change so often the words they say he said, is it at all to be wondered at that they left out intentionally or unintentionally one figure 5 from the conversation they did have with him, and that when he told them Anderson's check for pension was for about $550 and $10 off for his attorney's fee that they should say $50, and the $10 attorney fee made it $60 in all?

Laughlin. R., p. 47–8. Says Finley and Anderson were under the impression that if any pension had been granted at all—I will say Anderson—I, perhaps, should say that Finley *knew* that if any pension had been granted at all it should have been commenced with a large amount.

P. Finley. R., p. 44, says:

Well, judge, *I had no reason to believe that it was any more, and I made no complaint myself.*

Q. Did you not, in answer to my question, say *that you guessed it might be more?*

A. *Well, that's all I had to go by; just merely guesswork—supposing and guessing.*

Here Laughlin and Finley flatly contradict each other on this point.

And was this statement—conversation, oral or verbal admission, made deliberately and understandingly by

Humes? Finley says nothing about this, except that it was a very brief interview. And Laughlin fixes that it was so. R., p. 49.

Q. The conversation you had in Humes' office was a very brief one? A. Well, yes; I believe *it lasted only a few minutes.*

Q. *So brief, I believe you testified, that you did not sit down in the office?* A. *Yes, sir.*

Q. You were there only a few minutes? A. Yes, sir.

This proof of the prosecution not only negatives the idea that the oral or verbal admission—statement—in such a conversation was deliberately and understandingly made by Humes, but shows affirmatively—is affirmative, not negative, proof of the fact that it was not deliberately and understandingly made by Humes. And so lacks this essential ingredient to make it competent evidence.

Laughlin:

Q. And that did not allow as much as the old pension law?

A. Yes, sir; so Humes told me.

P. Finley, R., p. 39:

That it was not so much under the old law.

Here Laughlin and Finley flatly contradict each other again.

Laughlin, R., p. 49-50:

Q. Laughlin, about retaining of $10 as an attorney's fee, it is not a clear memory to you that he said he retained it or that he said it was retained?

A. Well, I won't say that he said he retained it as "my attorney's fee."

P. Finley, R., p. 39:

Q. And that it was $60, and he retained $10?

A. *He had retained $10 for his fee, which the law allowed him,* . . .

Q. Whether Humes was the attorney or somebody else was the attorney, you would not undertake to state?

A. No; I would not undertake to state that.

Here they contradict each other again flatly.

Q. Laughlin, I note that I asked you before, and will ask you again, you did not go into any details with Humes about the exact details of this pension or about the cashing of the check? A. No, sir; nothing was said about any check at all.

Was it correctly understood and reported? Finley and Laughlin do not agree about what was said themselves. So it was not correctly understood by them, and as they show by their own statements, it was not correctly reported. Finley says it was *Tuesday, October 29th. Well, October 29th was not Tuesday.*

Laughlin says he don't know what day of the week or month it was.

Anderson said Humes gave him $50 and said nothing more.

Finley says Humes said he kept $10 for his fee.

Laughlin says Humes told them $10 fee was taken out for an attorney's fee, but Humes did not say he retained it as his fee as attorney.

Anderson says Humes said, "Your mail is come."

Finley says Humes said "it came *in to-day's mail.*"

Laughlin says Humes said it *came this morning, in the morning's mail.*

Finley says Humes said it would *be less under the old law.*

Laughlin says Humes said it would *be more under the old law* and less under the new. *Finley says this was all that was said.*

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Laughlin *says he asked in addition what evidence of the pension there would be, and he said his books.*

Laughlin *says it was a very brief conversation of only a very few moments. That they did not sit down. That they did not enter into any of the details.*

So it is submitted that it lacks every essential element to make it competent proof as an oral or verbal admission. And that this was a question of law for the court to determine, and if the evidence was not competent it was the duty of the court to have refused to admit it; not only so, but it was his duty to have ruled it out and excluded it from the jury. And the court erred in not doing so.

A. Finley's evidence contains nothing else but what has already been commented on. It shows he, Anderson and his son, told the same story and adhered to it for a long time—first, that Anderson paid him the money for the cow, and second, that Anderson's wife paid it, and at last, when driven to it by the production of the written receipt, that they had made an unintentional mistake in fixing it up; it read, "received of Mary Ann Anderson," and they were driven to the acknowledgement of the fact that P. Finley had all of Anderson's money and had paid his father himself out of it. That Anderson was not there at all, and that his wife had not brought over the money that morning and paid it, as all three, Anderson and A. and P. Finley, had sworn for so long. The father was trying to sustain his son in his story, but we submit, in view of his many self-contradictory statements, fell far short of it. He could not support him because the son so contradicted himself that there was nothing for him to support him in. This is the evidence of the prosecution on this claim.

Now the evidence of defendant.

1st—the witness of the law—the presumption of innocence, this court terms it, in the Coffin case, that

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must remain until it is overturned by proof of guilt beyond a reasonable doubt.

And we submit that, without more, the evidence of the prosecution is not such that it overturns this witness of the law—this presumption of innocence beyond a reasonable doubt. And we may as well also look to the proof. Anderson's pension was granted Monday, September 10, '94 —R., p. 22.

Anderson and P. Finley would like to deny this if they could, but it is record evidence and they can't, and can't change the day of the week or month or year of that by swift swearing that it was different

Defendant, R., p. 114.

I first got notice of the granting of Anderson's pension September 21,' 94—Friday. On that day I wrote him a notice about it. This went to Raleigh, Tenn., his then P. O , by Saturday, September 22, '94. He came first to my *office Monday morning, September 24, '94*, and I then told him that his papers had gone to Woodstock, Tenn , his original P. O., and on that day at his request I wrote the P. M. there to send him his papers to 17 W. Court street. He made his mark to this, and in answer, all the papers addressed to him came to that number. His voucher and pension certificate, telling him Chiles was atttorney to whom the $10 fee was due. He was again in my office and executed his voucher for $546.40 *September 28, '94—Friday.* I swore him to it, and he made his mark in the presence of two witnesses, Franklin and Bettis. I then, after placing it in an envelope with a stamp, gave it to him and he mailed it. The check is dated *October 3, '94—Wednesday.* His check and November voucher came the day he cashed it, *Monday morning, October 8, '94.* Check was $536.40. It got to the office that morning. He came about 10 or 11 o'clock, and the envelope that contained it was, at his request, opened in his presence and check fixed and given to him. I told him September 24th it had been granted, and on the 28th

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he executed the voucher. He knew it was coming and was looking for it. November 4, '94, voucher was with this check. When I opened that envelope, at his instance, I took his check out at his request, and he touched a pen and made that mark. I witnessed it myself, and a young white man in my office, Purcell, and I then gave Anderson the check. I had Sanderlin show Anderson the Mechanics' Savings Bank, corner Main and Madison. He went out of the office with Sanderlin. I did not see him any more that day. He left his pension certificate and voucher on the desk. Only took his check with him. And I put his certificate and voucher in the envelope, and put them in the desk. This was about 10 or 11 o'clock. I know Sanderlin. He is a pensioner.

Q. Did you pay Anderson any money in your office on that occasion? A. Not one cent.

Q. That was what was done in regard to this. A. That was what was done, and that was all that was done.

That check is the full amount he was entitled to, less $10 attorney fee. The amount in there was filled in in Carpenter's office.

Q. And all that you did was to assist him in endorsing the check? A. That was all.

Q. And when that was completed you delivered it to him? A. Yes, sir.

Q. And Sanderlin went with him out of your office? A. Yes, sir.

Q. What did you get for your services in regard to that check, if any thing? A. I got a notary fee of fifty cents for executing the voucher. I got nothing for the check.

When Sanderlin took the man to the bank to get the money he brought the fifty cents back to me.

I saw nothing more of him then.

He knew the amount that was coming to him.

Q. Besides the expression of amount in the voucher and that check, had you ever talked to him on the sub-

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ject prior to that time? A. Yes, sir; I talked to him; I read him the certificate that tells he was entitled to $12 a month, from October 18, '90.

Q. Had you ever, prior to that time, talked to him on the subject of about how much he would get? A. Oh, yes, sir; I told him that at the rate which they had given him it would be about $500 or $600.

Mr. Simonton: I wish you would designate the time and place of the conversation, Col. Gantt.

Q. Can you name time and place when that conversation took place? A. I recollect we talked it over fully *Monday morning, September 24th*, first time I saw him after pension was granted, and then we read and talked it over *September 28th, when he executed this voucher.* R., p, 113–7.

Q. Did you present the check of Anderson to be cashed? A. *No, sir.* R., p. 121.

Q. Did you get any of the money in that check? A. No, sir; I was brought back 50c notary fee, as I told you.

Q. I believe you have answered in regard to the payment of money to Anderson, and you answered that you did not pay him any. A. *Not a cent.*

Q. Have you now, or have you ever had, growing out of these three transactions that we have explained, any of the money belonging either to Anderson, Bloodson or Hayes? A. *Not one cent.* R., p. 122.

Q. Do you know Finley? A. Yes, sir.

Q. State whether or not Finley ever came to your office with Anderson? A. He came to the office with Anderson now and then. He left him there and went off.

Q. Did he come with Anderson on all occasions? A. No, sir.

Q. State whether or not he was in the office at the time that check was made and delivered to Anderson? A. No, sir; he was not.

Q. Was Laughlin there? You know him? A. Yes, sir; I know him. Laughlin was not there, either.

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Q. Did you pay Anderson instead of giving him that check; give him $50 in your office? A. *No, sir.*

Q. Now, state whether or not you saw Laughlin and Finley together, or do you remember about them? A. *I remember I saw them about three weeks after Anderson got his check*, I talked to them two or three moments in the back room of my office.

Q. What is Laughlin's business? A. Lawyer.

Q. Do you know whether or not he was attorney for Anderson? A. No, sir; I did not know that he was attorney for Anderson. I know that he came there and made inquiry about it, that is all.

Q. Now, at the time of that enquiry, state whether or not Anderson knew perfectly well the amount he was entitled to, and what he had got? A. Yes, sir; we had talked to him fully. (Objected to by District Attorney because witness did not know what man knew; no ruling by court.) A. I talked it over to him; I do not know anything further than that, of course.

Col. Gantt: Q. They came and talked with you? A. Yes, sir.

Q. Well, did you tell them that he was only entitled to $60 and that you were entitled to—

Mr. Simonton: Col. Gantt, I had rather you would ask him what he told them rather than to tell him what to say. I object to your leading him in that way.

The Court: You may ask it in that form. They have said distinctly that he did tell them that.

Col. Gantt: Q. Now, did you tell Finley that he was entitled to only $60, but that $10 of it was due you as your fee? R., p. 123-4. A. No, sir; they are mistaken about that. I told them—

Q. Never mind. You did not tell them that? A. No, sir.

Q. Were you entitled to any fee? A. Not a cent.

Q. Well, now, then, did you tell Laughlin, or Finley in Laughlin's presence, that he was entitled to $50,

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and you took $10 for the fee? A. No, sir. They misunderstood what I said.

Q. How long were they there? A. Two or three minutes. They did not sit down. I was busy in the front room. They came in the back room and said they wanted to speak to me, and in two or three minutes we talked, and they went out. They did not say anything to me hardly, and went off.

Q. The object of their visit was to inquire about Anderson's money, the pension that he was entitled to, and amount of it; you understood that? A. I understood that they made a casual inquiry in a general way about Anderson's claim.

Q. And you say that was *two or three weeks after he got the money?* A. *Just three weeks to a day.*

Q. You say your office was full of people at that time? A. Yes, sir; I was in the front room when they called me in the back.

Q. And your conversation lasted about the period you have mentioned? A. Yes, sir.

Q. When it was through, what did they do? A. They seemed to be perfectly satisfied and went off.

Q. Was anything said in the conversation about the old pension law, what it would allow, and the new pension law, the one under which Anderson got his pension? A. Yes, sir; I said that he got the maximum amount, $12 a month, and got it from the date of filing the application, and that was the act June 27, 1890; the pensioner got so much a month from date of filing application—in his case that would be about $550; that under the old law it would have dated back, the original pension law, to the date of the injury during the service, and in that case would be $2,000 or $3,000.

Q. How much did you tell them it was? A. *About $550. I told them $12 a month from October, '90.*

Q. What difficulty, if any, was there in getting information as to amount to which pensioner was

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entitled? A. Not a bit in the world; just to ask and they would give it to you.

Q. To what places could they write to get it? A. To Knoxville or Washington. R., p. 124.

The Court: (R., p. 125). Q. Was the fee on Anderson's check $10? A. *Yes, sir; all of these were under act June 27, '90.*

The Court: Q. If I understand you, you did not have any claim against any of these checks for attorney's fees? A. No, sir.

The Court: Q. And no claim of any kind except the fee of fifty cents, which was paid. A. That is all.

Q. I merely ask that to eliminate from the case unnecessary questions. So much has been said about fees. A. *I would like your honor to look at one of those letters showing about fee. Anderson was in my office September 24, 28, and October 8.* (R., p. 127). I don't think anybody was with him on any of these three occasions. As I said, Colonel, sometimes Finley would bring him there when I was busy and go off and leave him. Now, whether he was with him on any of these three occasions I don't recollect; and sometimes he would come down by himself, like he said.

Q. Did not he and Finley come in there early in October, on a Tuesday, and you tell them that his pension had not yet come; he would have to come back another day soon? A. *No, sir.*

Q. And did not they come back on the *following Saturday?* A. *No, sir; Anderson came on September 24, and I told him his papers were at Woodstock.*

Q. Do you now say that Finley and Anderson did not come in *there on a Tuesday in the early part of October, '94,* and have a talk with you about the pension, in which you said the pension had not yet come? A. *I said they did not come. Anderson came on the 8th, but they did not come.*

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Q. *What day of the week was the 8th.* A. *I think it was Monday.*

Q. Well, when did they come around—Laughlin and Finley—to inquire of you, did you tell them that his pension money had come that morning? A. No, sir; they are mistaken about that. I did not tell them his pension money had come that morning; I told them his pension had been granted.

Q. Did you tell them that $60 had come and that $10 was retained as attorney's fee? A. No, sir; I did not tell them that; they misunderstood me.

Q. Did you say Anderson got $50? A. I told them Anderson had got about $550; that it was $12 a month from the day he filed his application in October, 1890.

Q. Is it not true that you explained to them why he only got $50? A. No, sir; I explained why it was he got $12 a month from October, 1890, instead of from the time the injury occurred, under the old law. R., p. 128.

Q. You had Anderson's pension certificate at that time? A. His pension certificate and November voucher were sticking in the desk all the time.

Q. Why did you not give him the certificate when they came? A. Laughlin just asked me what evidence they had and I told him the papers in the office.

Q. Did you not tell them "my books will show?" A. No, sir; I told him the old man's papers were there in the office. Laughlin was mistaken about that. His certificate and voucher were there in the office sticking in the desk.

Q. Did you tell them that the old man had got his check and you had sent Sanderlin with him to the bank and he had drawn his whole money? A. I don't remember that I entered into that part of the details. We had a casual conversation of a few minutes standing in the back room.

Q. It was, however, about Anderson getting $50,

and they wanted to know why he did not get more? A. They did not tell me that; did not ask me why he did not get more. They made a casual inquiry of me as to what Anderson's pension was.

Q. What do you mean by "casual?" Did they have any other business at your office? A. Not that I know of.

Q. They had just walked down there to have a casual conversation—to make a casual inquiry of you? A. They called me and talked to me five or ten minutes in the back room.

Q. That was the only conversation they had with you about Anderson's pension, was it? A. Yes, sir; they asked me about Anderson's pension and I told them he had been granted $12 a month since October, 1890, and got about $550, and his papers were there in the desk; that was the expression I used.

Q. This Anderson check for $536.40 appears to be witnessed by yourself and Purcell. Who is Purcell? A. He was a young white man who was in my office at that time.

Q. Where is he now?—R., p. 129. A. I don't know, sir. I have been trying to find his whereabouts, but I have been unable to do so.

Q. Has he been subpœnaed as a witness? How long has he been away from Memphis? A. I did not know he was gone until I went to make inquiry about where he was.

Q. What was he doing in your office? A. Learning typewriting and shorthand.

Q. Anything out of the usual way about it? A. Nothing that I recall just now; nothing that I remember just now. I will frankly tell anything that I recollect, but I do not recollect anything unusual about it.—R., p. 135.

And in every single word that the defendant or plaintiff in error says, besides being exactly corroborated

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by every witness of his own, and all the pension certificates and checks, and all the bank records, and by Anderson, Finley, Laughlin and Bloodson in many things, J. J. Murphy, government witness, R., p. 54-7, corroborates defendant in everything as to check, voucher, etc.

Franklin (c), R., p. 136-7. I recognize my signature there, and see Anderson's mark. This is a voucher. for $546.40.

Q. Looking at it and your signature, do you remember whether Anderson in your presence put his mark to that paper? A. He was right there. I know him.

Q. You find it was subscribed and sworn to September 28th. A. Yes, sir.

Q. From looking at that paper and remembering Anderson, I will ask if you witnessed his signature? A. I did, sir. I know him when I see him. He is a ~~Lamar~~ dark man.

Q. At the time that he put his mark on that paper and you witnessed it what was done if anything to make Anderson understand it? Was it read to him or not? A. It was read to him by Mr. Humes.

Q. Do you know who the other witness on there is—Bettis? A. Yes, sir; he is a tailor. I know him when I see him. A white man. His tailorshop was just across the hall. There was a little hallway there.

Q. Was he present when Anderson signed his name? Bettis was standing there too? A. I think he was, as far as I can recollect.

Q. I understood you to say that this paper was read over to Anderson by Mr. Humes. A. It was.

Q. The amount of money and all was stated in it? A. Yes, sir.

Q. I was asking you to examine a check; you had stated, I think, that the check was payable to Anderson and that it was for $536, or some like amount. Now, you said that you remembered Anderson. A. Yes, sir.

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Q. Just tell the jury in your own way what, if anything, you know about Anderson in connection with the check I handed you at the hour of recess. A. Well, I was in the office at the time, and I was called on to attest his signature to his voucher, and when voucher went and he returned he brought it to the office to Mr. Humes, with his check in it, and got Mr. Humes to fix up his check, and he left there with his ~~his~~ check. When he went out of the office Sanderlin went with him. Sanderlin waits on Mr. Humes. The last I saw of Anderson he went out of the office with Sanderlin, with the check in his hand. That day I saw him no more. I have seen him several times since. R., p. 141. Every time I signed a check the man was right there present.

Q. I did not ask you that. I was not doubting that. Now, sometimes it was a woman wasn't it? A. Yes, sir. R. p. 145. Mr. Humes always signed with me, and the person was always there to attest it.

Sanderlin (c.), R., p. 152.—I am a pensioner. I know Anderson; knew him in the army. Was on guard with him. In October, '94, Mr. Humes give him a check and I went with him and showed him the Mechanics' Savings Bank, corner Main and Madison. It was about 11 or 12 o'clock. Anderson and Mr. Humes both requested me. Anderson didn't know where the bank was. He had the check. He went in the bank before. I showed him where it was and went right in behind him. He just handed the check to Mr. Young Humes and he asked him "what's your name?" and he says "Wm. Anderson." He says, all right; and he looked at me, and I says "yes, sir, it is Wm. Anderson." And Mr. Young Humes paid him. The brother of defendant. He stays in the bank. Wasn't in there no time. Anderson went down Main street and I went back to the office. I got 50c. and I give it to Mr. Humes when I got to the office. I didn't get any more, not a nickel of that—R., p. 153–4.

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W. Y. C. Humes, R., p. 160.—I am cashier of Mechanics' Savings Bank. Am half-brother of defendant. Anderson's check was cashed at the bank. Nothing on the face of the check shows the date it was cashed by the bank, but the bank books do. Anderson check is entered on books of the bank October 8th. I paid it to Wm. Anderson, a colored man. I am sure I paid it to Wm. Anderson. Wm. Anderson came in with the check to the bank on October 8, '94, and I asked him "what is your name?" He answered, "Wm. Anderson." Sanderlin was there, and I said "Sanderlin, is this right?" He said "yes, sir." And then I paid Anderson the check. I am positively sure I did not pay the check to a white man. I did not pay it to Sanderlin. I paid it to Anderson. I have seen him lately. I saw him in this court-room week before last. I recognized him as the man I paid the check to on October 8th. He said his name was Wm. Anderson, and Sanderlin identified him. The amount of that check is $536.40. I paid him the whole of the money, with the exception of the exchange; 25c. on the $100. It was all paid to him, with that exception. That check is entered on the bank book, Check No. 743,149, dated Knoxville, Tenn., October 3, '94, drawn on Assistant Treasurer United States, New York. The check was endorsed by Wm. Anderson, his mark witnessed by L. W. Humes and G. H. Purcell. Bank endorsed it to our correspondent in New York. After I paid it to Anderson I put it in my cash drawer. Entered it upon my cash-book, then entered it in my collection register, then wrote a letter to New York, and sent it to them there. I had advice from them that it was paid.

Q. Were your entries of even date with that? A. Yes, sir. (Read) "D. A. Carpenter, apc. Wm. Anderson, collected of Assistant Treasurer, New York, date of check October 3, '94; sent to National City Bank, N. Y., $536.40." I can't carry all the checks in my head. I have a record. Nine pages intervene between the entry October 8th, de-

scribing Anderson check, and December 24th, describing Bloodson check. Thirty-eight different checks are described on each one of those pages. The entries in regard to Anderson check were made on the same day with the payment of the check.—R., p. 164. Well, I recollect the payment of the check of Wm. Anderson in this way. I recollect that a negro man came in there and got the money, and I have seen Anderson and I recollect Anderson as the man that did it. I remember it because Sanderlin brought the man in there, and I have seen Anderson since, and I recognize Anderson as the man, and it made an impression on me because it is a very large check to pay to a negro. Sanderlin brought a number, but not a number of that sized checks, to be paid. I say I have seen Anderson since and I know I do recognize him. Then I positively recognized him.

On Bloodson matter you have

Bloodson (c),

F. and A. Snyder, and Copely (c).

For defendant you have

First. The witness of the law—the presumption of innocence,

Defendant,

Pension certificates,

Vouchers,

Checks,

Franklin (c),

Sanderlin (c),

W. Y. C. Humes,

Bank records and evidence, and

L. C. Humes.

Bloodson, R., p. 58.

Q. And you got how much?

A. "Mr. Humes comes out the door as you comes in this room whar I was, an' next to the door as you go down stairs, an' he says

here Uncle Isaac, here's $5."

A. $50. "I said, Mr. Humes give me $5."

Q. How long was that after Christmas after you got your $507? A. I reckon that was on—let's see—. R., p. 62.

Q. When did you get it—the first you got? A. Well, ~~as nigh~~ *as nigh as I can ricollect*, the fust I got I got it Mr. Humes 'long in *Christmas week*.

Q. Whereabouts was his office then? A. His office was down here on this street, facin' court square.

Q. On the street running to court square? A. Yes, sir.

Q. Do you know what they call the street? A. No, sir; I don't know what they call it; *at least, I don't know none the streets*.

This is given as a fair test of the intelligence of these prosecuting witnesses. Just like Anderson, not of sufficient intelligence to know any street of the city where he lives. And it is this glaring lack of intelligence that the learned trial court told the jury was of course a minor matter. And yet witnesses like these, who show they have so little intelligence that they don't know the streets of the place where they have lived over thirty-one years, they claim to fix on and know and remember a day of a week and a month, and swear to it, and we are asked to believe they are telling the truth. That they know and are speaking the truth. And the trial court charged the jury that if in such sworn evidence as this these witnesses differed—contradicted each other—as to these dates and days of the week and month, that it was an immaterial difference to which the jury should give no consideration. In short, that the jury must convict whether the prosecuting witnesses were intelligent or not—whether they contradicted themselves or not. And even if the wit-

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nesses of defendant were intelligent and had the sworn vouchers of these people and checks and bank records that fixed the dates and days of the week and month. In other words, told the jury to believe the ignorant witnesses of the prosecution, and to convict on their evidence if they contradicted each other and did not know the dates and days of the week and month or year; and to convict and disbelieve the evidence of defendant's witnesses, although they had record evidence that showed the dates they swore to were true. The vouchers, sworn statements of the prosecution's own witnesses, and the checks and bank records.

Bloodson says, "I took an' fotch my mail to Mr. Humes. R., p. 58. I did some plowing and planted out some trees Monday before Christmas. I can't read or write. Mr. Humes did not say whether what he gave me was all that was coming to me. When he paid me the money, nothing was said between me and him whether that was all, or whether that was right or not.

Q. When did you file your application for pension? A. I don't know nothin' at all 'bout that.

Q. You don't know how long ago it was? A. No, sir. R., p. 61.

Mr. Humes said, "I wouldn't take a five cent of it to save my life." Well, I told Mr. Humes that I didn't say that he would. R., p. 62.

The Court: Q. What was it Mr. Humes said? A. Said he wouldn't take a five cent from me to save his life. I said, "Mr. Humes, I didn't say that you would."

I reckon a little over six feet. My hair and beard are white.

Q. Do you feel any certainty about it—about when you went there—to Mr Humes' office, when you say you got money? A. I had no recollection 'bout what time or what day it was, only I know it was 'long in the Christmas week.

Q. Don't you know that you were there the day be-

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fore Christmas? A. *Well, I might have been there the day before* Christmas, lookin' for a letter.

Q. You did not say anything to Mr. Humes about not getting enough money? A. I didn't say anything to him 'bout gettin' any money at all.

Q. When he handed you the $50, why didn't you say, "This is not all that is coming to me"? A. I don't know.

I didn't have time to count it.

I get pay from the time I put in my papers. Several hundred dollars.

Q. You knew all that before Mr. Humes handed you $50, because Copeland had already told you? A. I know Copeland say if I put in for old claim, that ought to be the rise of four or five hundred dollars comin' to me.

Q. And you knew that, and when Mr. Humes handed you $50 why did you not say to him, "I was to get the rise of four or five hundred dollars"? A. I wasn't to contradict his word. He was put there to do my writin'.

Q. Why did not you say something to Humes about it then? A. No, sir; I never said nothin' 'tall to Mr. Hume 'bout it. I never had no argument with him.

Q. Why did not you come back and tell him this was a mistake this time? A. I just thought he knowed his business, an' I put him there an' give him the papers for to do right by me. He knowed how much was comin'.

Q. Why did not you come back to him and tell him? A. Oh, no, sir; I can't argy with white folks that a way.

Q. Did not you know there was over $500 coming to you? Copeland told you that. A. He told me ought to be; he didn't say how much a month.

The day before Christmas, December 24, '94, Mr. Humes did not hand me that check and I did not make my mark. I did not make my mark on it. Franklin

did not witness it. I did not go out of Mr. Humes' office with Sanderlin and go to the Mechanics' Savings Bank, corner Main and Madison streets, and hand that paper to the cashier. (R., p. 65.) He did not count out to me $567.25 and hand it to me. That was not Monday of last Christmas week. The cashier did not say anything about that being a big amount for the day before Christmas. Not a thing of that sort happened. When I went back to Mr. Humes and asked him for my papers he gave them to me. I never told about having that letter written on the former trial. R., p. 67.

Q. You just took the money he handed you and never knew how much it was? A. No, sir; never noticed how much it was; just crammed it down in my pocket and never took it out.

Q. You can tell figures when you see them? A. Oh, no, sir; I don't know nothin' 'bout no figgers.

Q. And this money was in bills? A. It was that.

Q. If you can't tell figures, how can you tell how money is on the bills? A. That's what I tell you, didn't know figgers, didn't I?

Q. How can you tell money? A. If you give me this here silver I can tell. I can tell, sort o' 'bout a $5 bill if you give me that.

Q. Was this he give you in $5 bills? A. I never looked at it.

Q. And you did not try to count any of this, though you had all that day to do it in?

Q. So you knew you had not got enough then? A. Yes, sir.

Q. And you never said a word? A. No, sir; only to ask people to try and give me some understandin'.

Q. Your feelings were hurt that very day because you thought you had not got as much as you ought to have had. A. Well.

Q. And did not say a word to Mr. Humes? A. No, sir; I didn't cross no word with him at all; just thought

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he knowed his business, an' I put up with what he give me.

Q. When I was asking you why you did not say anything to Humes whether you had found out or not how much money was coming to you, didn't you tell the jury about fifteen minutes ago that when Deadrick made out your papers he did not tell you how much was coming to you, but that before you ever got any money from Humes, and when you went to Copeland, he told you it was the rise of $400 or $500 that was coming to you? Did not you just tell the jury that Copeland told you before you ever went to Humes that the rise of $400 or $500 was coming to you in pension money?

The Court: Well, can you answer that?

A. *Squire, they has kind o' done me up.* You must give me a chance to study about it.

The Court: Was your conversation with Copeland about it before or after you got the money from Mr. Humes? If you cannot answer it, say so. A. *I aint gwine to answer that question, boss.*

Bloodson contradicts himself and says he was at Humes' office the day before Christmas. But he says to get a letter. He denies he got the check, denies he signed a voucher. Says he came on December 27th and got, he says, twice, $5, and once $50, and the questioner says $507. Says he worked all day before Christmas plowing a little lot 55 x 104 feet, and planting out some few little trees. Defendant has many witnesses to show the contrary. Two are introduced to support it is called Bloodson. They do not claim to have been with him when he signed his voucher. They say he was doing the work stated the day given. One says she counted the $50 Bloodson had December 27, '94. These two so-called supporting witnesses of Bloodson are F. Snyder. (R., p. 70–4.) She shows that she pretends to claim she knows by killing a hog. But without commenting at any length on her evidence it is submitted that the cross-examination

shows she knows little or nothing, and completely demolishes her theory of remembering it from killing a hog. It demonstrates that about all she could remember was killing the hog. And A. Snyder, her daughter. (R., p. 74–8). She undertook to say she saw Bloodson all day plowing a 55x104 feet lot and planting some few little trees. She had nothing to remember it by, and it is submitted that the cross-examination demonstrates there is nothing to support her. Copely (c) (R., p. 79), says, December 29, '94, he counted ten $5 bills for Bloodson. "Now, when I was writing for him, I received a letter along in June, '94, that his claim was allowed, and at that time he asked me about how much did I think he would get. . . . And I *told him that if he drew from the time that his claim was filed up until then he ought to get in the neighborhood of five or six hundred dollars.* R., p. 81.

Q. *He certainly understood all that, and certainly understood from you, way back yonder in June, '94, that he was going to get five or six hundred dollars if it was allowed?* A. *Yes, sir.*

Q. *And you had found out that it was allowed and told him so?* A. *I did.*

Q. There is a lot of other pensioners here of his race besides Bloodson—colored people? A. Yes, sir.

Q. And there was nothing to keep the old man from knowing? You had explained everything to him; how much was coming to him and all? A. *I had explained everything to him.*

Q. That was the way the pension was allowed? *The rate per month $12?* A. *It was $12 per month.*

Q. *Well, he had his voucher in his hands?* A. *Yes, sir.*

The old man had set down White Haven as his residence first. He did not get his pension certificate in '91; it went to White Haven and got lost. This is all the prosecution's evidence. Defendant. (R., p. 117).

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Bloodson's certificate was *issued December 11, '91.* He swore it was lost. In case of loss he has to make application for duplicate. This was his case. He applied for duplicate and got it. I swore him to the application. In case of loss, before duplicate issues, permission is given to draw without it. He made first draw on permit. I wrote his statement, it was lost, and request for duplicate and permit to draw. Permit was sent him and certificate afterwards.

Q. Did you do these things as attorney? A. *I did them as United States Commissioner. I simply administered the oath according to form sent him by Carpenter, agent at Knoxville.*

Q. Did you get anything except the notarial fee? A. *Not a cent.*

Q. *Did you get any pay whatever as attorney for the prosecution of these claims?* A. *Not a cent.*

A. *Powers got fee in Bloodson's case; his name is on the voucher. Fee was sent to him. $10, act June 27, '90. The whole of Bloodson's money was $577 20 and $10 off attorney's fee. His check was for $567 20. He received a voucher and a permit to draw from Carpenter.* The original papers went to him at White Haven and were lost. This came to him through the mail in an envelope addressed to him at 17 W. Court street, at his request. When it came, as soon as he came in the office the envelope was opened at his request, in his presence, and he executed that voucher that you have before you. The voucher is the same as the others. It names a different man. The rate is the same. The amount is different, and executed differently. Bloodson made this *December 10, '94,* and it shows where I certify that he has his certificate with him that is erased, showing that he drew on a permit. The amounts were filled in at Carpenter's office at Knoxville. That paper came with those amounts filled in. I read this paper to him; he touched the pen and I made his mark there to the affidavit and receipts.

Franklin and Maynard witnessed it. Bloodson was aware of the contents of that paper. I read it and permit to draw to him at the time it was executed. The entire paper was read to him.

Q. *Is there anything on the back of that paper as to the calculation?*—R., p. 119. A. *Yes, sir; it is the same thing. It is made on them.*

Q. *Where was that made?* A. *At Carpenter's office at Knoxville. I am clear and distinct in my recollection that Bloodson knew the contents of that paper.* I read it to him, explained it to him and talked it over to him. When I had thus completed the paper and it was written with the permit to draw pinned to the face of it, it was put in an envelope addressed to Carpenter, Knoxville. The response was to come to him at 17 W. Court street. Yes, sir; Bloodson knew it was to come. He asked that it come that way. He took the letter and mailed it with the contents spoken of. The papers came in an envelope through the mail addressed to him to 17 W. Court street, and I saw them next on the morning of December 24, '94. And he was there during that day. When he came I told him the envelope was there, and at his request and in his presence I opened it, and it contained that check you have there for $567.20 and the voucher for February. The attorney's fee went to Powers, New Orleans. I know nothing more about its going to Powers *than the voucher shows.* I know I did not get it. The letter of the *Commissioner notified that Powers was attorney, and check was sent to him.* I wrote Bloodson's name on the back of the check and let him touch the pen to make his mark, and I witnessed it with Franklin. After I had done that, the check was delivered to Bloodson, and Sanderlin was sent to show him the bank.—R., p. 121.

Q. Did you go along? A. No, sir.

Q. Did you get any money at all in that check? A. Sanderlin brought me back a notary fee, 50 cents.

Q. With the exception of that did you get one cent of that money? A. Not a nickel.

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Q. Did you see Bloodson again that day? A. No, sir.

Q. Did you present that check to be cashed, and got none of the money? A. No, sir.

Q. Did you pay Bloodson any money in regard to that transaction in your office. A. Not a cent.

Q. Have you now, or have you ever had, growing out of these three transactions, any money belonging either to Anderson, Bloodson or Haynes? A. Not one cent. R., p. 122. *It is notable that the District Attorney didn't cross-examine defendant on Bloodson's claim at all.*

Franklin (c) R., p. 139. Q. Are you acquainted with or did ever meet or know Bloodson? A. Yes.

Q. What sort of looking man is he? A. He is about six feet tall, and has grey beard and hair.

Q. Look and state whether your signature is on that voucher? A. Yes, I witnessed his mark on this paper. I was present when he made it. The other witness is Maynard. It is $567.20. I know him, he used to be a deputy sheriff. We were both present and saw Bloodson make his mark. I say this looking at that signature and seeing mine there.

Q. Gentlemen of the jury, I would like for you to examine this. You have already probably looked at it. It has been in evidence. This is Bloodson's check for $567.20. A. I and Mr Humes are the witnesses to Bloodson's mark on the back of that check He was there and made his mark, and I witnessed it on this check, dated Knoxville, December 16, 1894. He took the check and went away with it on December 24th out of Mr. Humes' office. I did not follow him, or go any where with him. R., p. 139. The voucher was read to Bloodson. Oliver is the other witness. He was office-boy of Mr. Parker, whose office was adjoining Mr. Humes at that time. He is 20 years old and my color. R., p. 140. *It is noteworthy that the District Attorney asked this witness nothing in*

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cross-examination about Bloodson. Showing, we submit, that he thought nothing of this charge.

Sanderlin (c) R., p. 154. I know a pensioner named Bloodson—an old white-headed and whiskered man. About six feet high. In Christmas last year I went with him to show him the Mechanics' Savings Bank. He went in and they paid him. Mr. Humes, the cashier, paid Bloodson the money on his check. He gave Mr. Humes the check. I identified him. After Bloodson got his money he came out and went on down the street.

The District Attorney asks this witness nothing on cross-examination about Bloodson, indicating that he himself abandoned any idea of a conviction on Bloodson's claim.

W. Y. C. Humes, R., p. 162. I know a man named Bloodson. A tall, black negro, with grey hair and whiskers. I paid that check to Isaac Bloodson in the Mechanics' Savings Bank. I have a record of that check here. I can't carry all the checks in my head: December 24, 1894. Check No. 791,759; drawer D. A. Carpenter, account Isaac Bloodson. Mark witnessed by L. W. Humes and Franklin. Drawn on Assistant Treasurer United States, New York, December 16. Sent National City Bank $567.20. Sanderlin came with Bloodson. Well, he is a peculiar looking negro and he came in the bank on Christmas eve, in the afternoon, and I paid him over this $560, less the exchange, and I joked the old man about having so much money on Christmas eve. I am sure it was Christmas eve. I have seen him since. I have no doubt about his identity. I recognize him very readily. Nine pages intervene between the entry of Anderson and Bloodson's checks; thirty-eight checks on each page The entry is made the same day of the payment of the check. *The District Attorney asks this witness about Bloodson.*

L. C. Humes, R., p 180, son of defendant. I saw Bloodson at my father's office December 24, 1894. *District Attorney asks him nothing.*

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The first error that appears on the face of this record was the court's refusal to quash the indictment.—R., p. 89.

This is one of the grounds upon which this case is asked to be reversed and remanded for a new trial and the judgment set aside because the indictment is not valid, for the reason that defendant did not violate, nor is he within the provisions of the statute named (section 5,485) on which the indictment is found. But if any law of the United States has been violated by him (which is denied), or to which he is amenable or within whose statutory provisions he is, it is section 4, act June 27, 1890, 26 stat., 182, c. 634. In other words, he stands charged with a violation of the penal section of the general pension law of July 14, 1862. And he stands with a judgment against him, upon proof, showing, if any statute has been violated, it is the penal section of the invalid pension act of June 27, 1890. If charged with a violation of one act, can he be punished, on proof, showing, if any, a violation of another act? If charged with committing the offense of larceny, can he be punished on proof showing the commitment, if of any offense, of embezzlement? We submit not. The rules of law that govern and control this proposition we find thus stated. It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms.

"There can be no constructive offenses; before a man can be punished, his case must be plainly and unmistakably within the statute." Todd v. U. S., 158 U. S., 252.

The elementary rule is that penal statutes must be strictly construed, and it is essential that the crime punished must be plainly and unmistakably within the statute." Ballew case, *supra*.

United States v. Benecke, 98 U. S., 447. "He was

indicted in 6th and 10th counts, charging him with unlawfully withholding arrearages of pay and bounty from persons for whom, as agent and attorney, he had collected the same from the United States. The jury found him guilty; and on motion for new trial and arrest of judgment, the judges certified questions of law to this court on which they differed, as applicable to the case. The first of these is thus stated: Is wrongful withholding back pay or bounty by an agent or attorney from claimant, an offense under section 13, act July 4, 1864 (13 stat., 389), or under section 31, act March 3, 1873 (17, stat. 575), section 5,485. The act of 1864 is entitled an act supplementary to an act entitled an act granting pensions, approved July 14, 1862.

It consists of ~~thirteen~~ 15 sections, the twelfth of which is devoted to prescribing specifically the compensation of agents and attorneys for procuring the allowance of pensions and bounty, or other claims, under the act; and thirteenth section to prescribing a punishment for violation of the twelfth. There is here no provision in regard to services for procuring pay, nor any provision in the act in regard to it. The pensions to soldiers, their widows and orphans, is not pay, and the provisions for paying them are not under that act. Arrearages of pay were not collected under any pension law, or through the pension office. What is meant by bounty here is said in the briefs to be also passed upon and paid in another bureau. The indictment is perhaps on this point a little obscure. In sixth count defendant is charged as guilty of withholding arrearages of pay and bounty and in withholding pay and bounty. "Since the act in which this offense is described makes no provision for pay or bounty, and the fees regulated and acts forbidden are those done in regard to that act, it seems a reasonable construction of the penal part of the statute that withholding pay and bounty, which are not mentioned there, are not intended to be punished by the act.

It is not in reference to pay that Congress was legislating." The persons described who may be guilty are those prosecuting claims for pensions or bounty before the Pension Office. The offense described is "withholding from a pensioner or other claimant the whole or any part of the claim allowed and due said pensioner or claimant," and it is but a just limitation of the word "claimant" that he should be a claimant under that act, a claimant before the Pension Bureau. This part of the section is to be taken in connection with the taking of illegal fees, which manifestly refer to cases before the Pension Office, and which are described and punished in the same sentence and by the same penalty. The word "bounty" is not used in this sentence, nor the word "pay," but the argument is that the word "claim" includes them. We think this would be an unjustifiable extension of a penal statute beyond its terms and against its purpose.

"The first question is, therefore, to be answered in the negative, *and we need not inquire if the statute was repealed, since the offense described in the indictment is not within it.*

"The offenses in this indictment are said to have been committed in 1888. *The law then in existence did not make the act charged a crime.* It is argued by counsel that withholding the money due is a continous offense, and if the same money was withheld after the act of 1873, did make such withholding punishable, the indictment is good under that act. But without deciding here how far the withholding of the money, under a law which made that an offense when the wrongful withholding began, can be he held to be a continuous offense, *we are of opinion that it would be a forced construction of the act to hold that it was intended to apply to a case where money had already been withheld five years when the statute was passed. The party might very well be criminally wrong in failing to pay when he received it; but Congress could hardly be supposed*

to intend to punish as a crime his failure to pay afterwards what was in law but a debt created five years before."

U. S. v. Irvine, 98 U. S., 450.[e] Defendant is charged in indictment, that on December 24, 1870, as agent and attorney of Berkley, he wrongfully withheld from her amount of her pension, i. e., $525 allowed her under pension laws, and continuously withheld it until finding indictment September, 1875. Indictment comes within terms act 64, which we considered in Benecke case *supra*. But the judges have certified among others whether act July 8, 1870, does not repeal 13th section act 64. *By third section latter act, pensions are forbidden to be paid to attorneys and agents any more, and are required to be paid directly to the pensioner. It is not easy to see, therefore, how the attorney is to get possession of the money, and how he can withhold it, or why there should be any longer a law for punishing him for such withholding.*

[e] The statute revises act 64 as regards fees of such attorneys, and increases the punishment for exacting more fees than the law allows, but totally omits any penalty for withholding. Secs. 7 and 8, act July 8, 1870, 16 Stat., 195. It is argued that this omission was intentional, for the reason above stated, and as the statute repeals all acts in conflict with its provisions, it was intended to repeal the penalty for withholding prescribed by the act 64. The argument is not without force; but without deciding that point, we prefer to answer another question, which will decide the present case. It is not very easy to define for all purposes what constitutes under the statute a withholding of the pension. It cannot commence, of course, until the money is received by the party charged. Nor then, unless there is a duty of immediate payment to the pensioner. A reasonable time must certainly be allowed for this. What this is must depend in each case on its own circumstances. A refusal to pay on demand without just excuse would constitute withholding at once. Such delay as would show an intention to evade

payment would constitue a withholding. *If there is nothing but careless delay, the party might hold the money for some time without incurring this severe penalty of two years imprisonment. In short, there must be unreasonable delay, some refusal to pay on demand*, or some intent to keep the money wrongfully from the pensioner, *as would constitute an unlawful withholding in the meaning of the law.* But whatever this may be which constitutes the criminal act of withholding, it is a thing capable of proof to a jury, and which, when it once exists, renders the party liable to indictment. There is in this but one offense. When it is committed, the party is guilty, and is subject to criminal prosecution, and from that time also the Statute of Limitations applicable to the offense begins to run. It is unreasonable to hold that twenty years after this he can be indicted for wrongfully withholding the money, and be put to prove his innocence after his receipt is lost, and when perhaps the pensioner is dead; but the fact of his receipt of the money is matter of record in the Pension Office. He pleads the statute of two years, a statute which was made for such a case as this; but the reply is: You received the money. You have continued to withhold it these twenty years; every year, every month, every day, was a withholding within the meaning of the statute. We do not so construe the act. Whenever the act or series of acts necessary to constitute a criminal withholding of the money transpired, the crime is complete, and from that day the Statute of Limitations begins to run against the prosecution. In the case before us the judges certify that it appeared on the trial that the pensioner demanded her money of defendant December 24, 1870, and he refused to pay her, and had never paid her up to the finding of the indictment, September 15, 1875; that he requested the judge to instruct the jury to acquit him, because the offense was barred by the Statute of Limitations, which the court refused to do. We think the statute (Section 1044) was a bar, and we say in an-

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swer to question 2, that the crime, as shown in this case, was not a continuous one to the time of the indictment; and to 3, that the Statute of Limitations constitutes a bar to this prosecution.

Frisbie vs. United States, 157 U. S., 167, in part involves a construction of section 4, act June 27, 1890.

The general pension law was passed July 14, 1862, section 4692 *et seq.*, and amended from time to time. It provides that if a soldier was injured in the service and line of duty during the war of 1861-5, he shall be pensioned, or his widow, etc. It fixes the fee of the agent, attorney, or any other person at not more than $25 in case where fee agreements are filed in Pension Office, and at $10 where no such agreements. It fixed the penalty for the violation of any of the provisions of the act, and section 5485 is an amendment of that part of it. The pay of this pension began from the date of the injury during the war. The rate was from $2 to $72 a month.

June 27, '90, the new Invalid Pension Law was passed. It provides that any soldier in the late war who is now in any way disabled for the performance of manual labor in a pensionable degree, without being an injury received in the service, &c., he shall be pensioned, and his widow, &c. It fixed the penalty for violating any provisions of the act. This pay commenced from the date of filing claim. The rate was from $6 to $12 a month.

Under the general law the pensioner's first pay might be more than $3,000.

Under the new law it could not be more than several hundred.

As this record shows, Anderson and Bloodson were given their pensions under act June 27, '90. This act created a new class of beneficiaries upon the Government's bounty; parties that theretofore had no claim on the Government, and no rights as to it by reason of their having been soldiers and fought in its defense. The act, too, created a new class of offenses heretofore unknown to

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the law, and that were no violation of any law of the United States until it passed and became a law. Not a single qualification which gave a person a pension under the general law was necessary to obtain one under the new. And a person who obtained a pension under the new law had not a single requisite that would entitle him to a pension under the general law. Two entirely separate and distinct classes of persons by those two laws were made beneficiaries of the Government's bounty, and two as widely separate and distinct classes as it was possible in the exigencies of such a case to make laws with such widely divergent provisions and qualifications and yet aiming at the same common object, namely, to benefit the soldiers of the war. The fee under the general law was nearly three times what it was under the new. The pension under the old law was usually ten times what it was under the new. Anderson and Bloodson, this record shows, are pensioners under the new. It is that alone under which they have any claim or right. They have not a single requisite which would entitle them to a pension under the old law. They were not disabled by any injury received in the service and line of duty during the war, and do not claim to. Their rights rest alone upon the fact that they are totally disabled for the performance of manual labor by disabilities which were not received by them in the service and line of duty during the war, but which were incurred subsequently.

Is it not true on the facts stated that the offense sought to be punished in the case at bar is plainly and unmistakably without the statute whose penalty is sought to be imposed for the alleged offense. It is plainly and unmistakably outside of the statute 5485. And if any United States statute has been violated and offense committed, it is plainly and unmistakably within the provisions of the statute sec. 4 act June 27, '90. Sec. 5485 was passed nearly 20 years before act June 27, '90, and has no earthly connection with it. On the contrary they

stand upon the United States statute as two entirely separate, distinct and independent acts of Congress as it is possible to find, and with as widely varient requisites as can be found, providing for two as entirely separate and distinct classes of persons as can be thought of; as separate and distinct as if one was for the white soldier and the other for the black. The act June 27, '90, is in no sense of the word an amendment of the general pension law. It is not possible for it to have been so. Not a single thing germane to the old law is in the new. They are separate, distinct and independent laws of Congress. They provide for two as separate and distinct classes of persons as though the one was for the white man and the other for the Indian. There is nothing in common in them both, except that the rate in each case depends upon the medical examination of the United States Board of Surgeons; and yet in this the very widest difference is shown, because under the old law the soldier must prove that his injury was from army service. Under the new law it can be an injury not of army service. True, the penalty for the violation of each act in its general terms and wording is the same, but the two offenses as violations of the two different acts are as entirely separate and distinct as though one were the charge of larceny and the other embezzlement. Although the words of the two statutes fixing the penalty for the violation of the two separate and distinct laws be the same, the ingredients which go to constitute, or rather from which the beneficial interests arise, are as entirely separate and distinct as where the offense is in one case larceny and the other embezzlement. It is essential to constitute the crime of larceny that the real owner must have been deprived of the possession of the property alleged to have been stolen in such a way as to amount to a trespass by the taker. While on the other hand, in the crime of embezzlement, no possession of the owner is violated: the embezzler has in his own possession the

property charged with the safe keeping thereof. If the terms of punishment for both are the same, it is totally immaterial; the essence of the crimes is entirely different—entirely separate and distinct. So in the case at bar—the essence of the two laws is just as different as they are in the cases of larceny and embezzlement. Under the old law it must be a war service injury in order to give a pension. Under the new law it need not be an injury that was of war service origin, but the soldier must have been honorably discharged from the service.

Defendant cannot be legally indicted or punished for an offense under an act under which the two pensioners, Anderson and Bloodson, had not been granted pensions and had no claim or rights. As said in Benecke case: "It is but a just limitation of the word claimant that the pensioner must be a claimant under that act, a claimant before the Pension Office."

Again the court erred in refusing to quash said indictment, and upon which this case is asked to be reversed and the judgment arrested and a new trial granted, is because said indictment is bad for duplicity in that it charges two separate and distinct offen-es against two entirely separate and distinct persons. In other words, it charges the wrongful withho'ding of money from two persons, Anderson and Bloodson.

See McElroy v. U. S., 164 U. S., 76, cited before.

Pointer v. U. S, 151 U. S., 396, Mr. Justice Harlan: "While recognizing as fundamental the principle that the court must not permit the defendant to be embarrassed in his defense by a multiplicity of charges embraced in one indictment, and to be tried by one jury, and while conceding that regularly or usually an indictment should not include more than one felony, etc."

Again the trial court erred in denying defendant the number of challenges to which he was entitled by law. Sec. 819, Rev. Stat., provides that in all other cases, civil

or criminal, each party shall be entitled to three peremptory challenges. Defendant was put upon trial in legal parlance in three cases—to answer three separate and distinct charges on the last trial and the one now before the court for review. One case was Anderson, second Bloodson, and three Haynes. So he submits that under said section when he was put upon trial he was entitled to three peremptory challenges in each one of said cases—nine in all. He asked this of the trial court and it was refused, and is now submitted as error for which this case should be reversed, judgment arrested, and new trial granted. In the course of impaneling the jury, defendant challenged three persons peremptorily and afterwards challenged Shepherd, but the trial court held that he was entitled to only three peremptory challenges, which he had exhausted, and overruled the challenge, to which action of the trial court exception was duly taken. Shepherd was then sworn on the jury and sat as a member thereof on the trial If defendant was entitled to nine peremptory challenges, six persons unlawfully took part as jurors in his conviction. This is following the reasoning in Harrison v. U. S., 163 U. S., 140, by Mr. Chief Justice Fuller, where in a somewhat similar case the court say, "Counsel for the Government admits that the errors assigned in respect of the action of the court in overruling these challenges are well taken. We concur in this view. Reversed and cause remanded with directions to set aside the verdict and grant a new trial. In that case five persons were likewise separately challenged peremptorily, the challenges overruled, exceptions taken and they served on the jury. In the case at bar Juror Shepherd was the last that it took to make up a jury of twelve, and so he was the only one who was separately peremptorily challenged and the challenge overruled and exceptions taken and he served on the jury.

Juror Shepherd unlawfully took part in defendant's conviction upon this further ground because he had

formed and expressed an opinion of the guilt or innocence of the accused from having talked with one of the jurors of the first trial of this case. He was therefore challenged for cause. And this ground of challenge overruled also by the court. And for this reason, too, defendant asks that he be granted a new trial and said judgment set aside.

ASSIGNMENT OF ERROR.

The trial court erred in not giving defendant a new trial on the newly discovered evidence.—R., p. 15.

Defendant, R., p. 129. By District Attorney:

Q. This Anderson check for $536.40 appears to be witnessed by yourself and G. H. Purcell. Who is G. H. Purcell? A. He was a young white man, who was in my office at that time.

Q. Where is he now? A. I don't know, sir. I have been trying to find his whereabouts, but I have been unable to do so.

Q. Has he been subpoenaed as a witness? How long has he been away from Memphis? A. I did not know he was gone until I went to make inquiry about where he was.

Q. What was he doing in your office? A. He was learning typewriting and shorthand.

This is supplemented by defendant's affidavit.—R., p. 190.

Defendant makes oath that he has used due diligence to have the testimony of G. H. Purcell on the trial of this case. He wrote and telegraphed to points where he believed said Purcell could be found, but was not successful in ascertaining his whereabouts until after the trial and argument on the motion for new trial.

First, he learned by letter from Purcell's father that he had recently obtained employment as a postal clerk on

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the line of cars running from Greenville by Birmingham to Atlanta. He employed counsel at Greenville and also in Birmingham, and succeeded in reaching him at Birmingham through the well known firm of attorneys, Cabaniss & Weakley, and through Mr. Weakley succeeded in obtaining from his employer two days' absence in which to visit Memphis and give his affidavit which was completed at about 11:30 o'clock on the night of December 23, 1895, when said Purcell left to resume his employment by the 5 o'clock train on the morning of December 24. Affiant was not able at that late hour of the night to procure a notary public or justice of the peace to qualify said Purcell to his affidavit, but the same was witnessed by the stenographer, Solon Person, and J. R. Ridgely, an employee in the Continental Bank building, where the affidavit was prepared. The same was typewritten and signed on the night of December 23, as already stated, and is enclosed herewith. Purcell is the very person who was one of the witnesses on the check of William Anderson for $536.40.

The affidavit of J. M. Marsh was offered on the motion for a new trial. I have no personal acquaintance with said Marsh, and was not aware of the fact that he knew anything that would be competent and favorable to me on the trial of my case prior to the trial and until a few hours before the argument on the motion for a new trial. I pray that I may be allowed the benefit of these affidavits on consideration of the motion for a new trial.

G. H. Purcell in his affidavit says he was in defendant's office using the type-writing machine from October 5th to 25th, 1894. That he was called on to witness marks. That on December 23, 1894, he examined the Anderson check and his attesting signature is written on that check. He wrote it and wrote 98 Robeson street. That he had no recollection of the person who made the mark. That he would not have witnessed the mark unless the person had been present who made it. That he

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remembers Sanderlin, and remembers Sanderlin on one occasion going out of the office with a colored person to have his check cashed at the bank. That he remembers Franklin.

Marsh (R., p. 186) says knows defendant by sight. He knows Sanderlin. In going to defendant's office in October, '94, you had to go by his candy wagon. About then I saw Sanderlin with another negro pass my wagon, and as he passed he remarked, I am going to take this old man to the bank and get him a pile of money that big (affiant motioning with his hands). He was an old man and tolerably black. I know one of them had a piece of paper in his hand, but I don't recollect which one. It looked like it might be a check. I saw Sanderlin again that same day. Only a few minutes. He was on his way to Humes' office and as he passed he said, that old man got $500. I never spoke to Humes. I have known him all my life.

It is respectfully submitted that certainly the proper ground is laid for the introduction of the Purcell affidavit by the answers on cross-examination of the defendant to the District Attorney. And also in the affidavit itself by defendant. As well as to the evidence of Marsh.

And the trial court, in disposing of this, just says it is cumulative evidence only. R., p. 15.

This surely can't be a proper ground for rejecting it.

It is not cumulative merely. It is the independent evidence of Percell, the other witness to Anderson's mark on the check that he witnessed it. That it was an old black man. That Sanderlin went out of the office to the bank with him to get the money. That the signature of Purcell is his genuine signature. That the place of his then residence is also written in his own hand-writing. And he fixes the date between the 5th and 25th of October, 1894. Showing it was October 8th, 1894, when Anderson in truth came there and got his money. And it is another link forged in the wall of testimony that

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Anderson did not come on October 29, 1894, to Humes' office and get any money, $50 or anything else.

And so Marsh evidence. He saw the old colored man with Sanderlin early in October, 1894, go by his candy wagon on the way to the bank. One of them had a check and Sanderlin said I am going to take this old man up to the bank and get him a pile of money that big (affiant motioning with his hands) and only in a few minutes Sanderlin came back on his way to Mr. Humes' office and as he passed said, that old man got $500.

There is nothing about this evidence that can be called merely cumulative.

It is the independent evidence of two witnesses as to vitally material facts which were in their own personal knowledge. To which no one else could testify or knew of.

And surely in justice and right entitled the defendant to the weight of their evidence if it were but a feather weight, because it might of itself alone turn the scale of evidence in his favor with the jury in spite of all the trial court had said against him in the charge.

And so for this reason, too, we submit the case should be reversed and cause remanded for a new trial.

J. M. GREER,

Counsel for Plaintiff in Error.

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